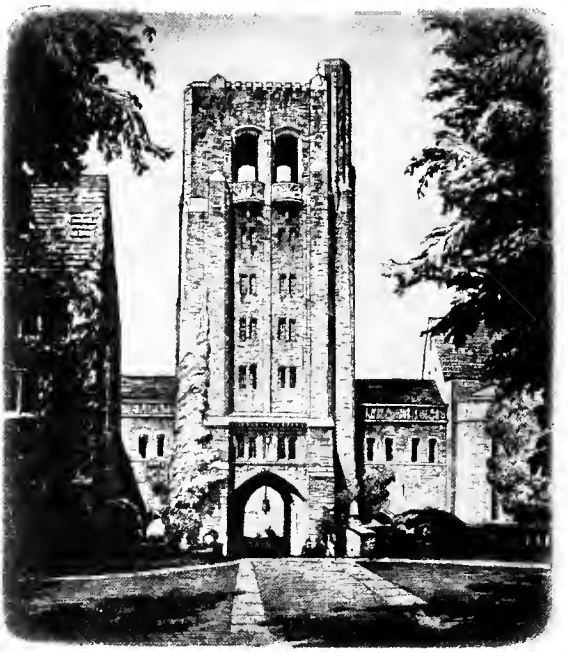

AN EXPOSITION

—OF THE—

PRACTICE RELATIVE

—TO THE—

RIGHT TO BEGIN

AND REPLY,

IN TRIALS BY JURY, AND OTHER PROCEEDINGS, DISCUSSIONS OF LAW, ETC.

BY

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WITH ANNOTATIONS

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BURLINGTON, N. J.:
PRINTED BY S. S. MURPHEY,
1880.

AUTHOR'S PREFACE.

"If any apology be requisite for offering this treatise to the profession, it must be for the execution, and not for the design of it. Although the great practical importance of the subjects which it embraces is known to every professional man, there is, in point of fact, no work in existence which professes to treat of and explain them. In the able treatises on the Law of Evidence, by Messrs Phillips and Starkie, they are but lightly touched on, and since the last editions of those authors, a number of most valuable cases have been decided which throw considerable light on the subjects of the Onus Probandi and the Right to Begin; while this latter has been further most materially affected in some particular species of actions by a resolution entered into by the judges in July, 1833. With respect to the excellent little works on evidence by the late Mr. Roscoe, not only does the first of the foregoing observations apply, namely, that many important decisions have been come to since the very latest editions of them; but it is to be remarked, that so far as the matters under consideration are concerned, they partake more of the nature of digests of cases than of regular and systematic treatises. Considering then the vast importance of the subjects in question, the absence of any work to illustrate them, and the neglect of others better qualified than himself to take the matter in hand, the author was induced to attempt this essay.

It consists of three chapters. The first treats of the Onus Probandi, or burden of proof generally; in which the principles by which it is regulated both when there is, and when there is not, a presumption of law in favour of the pleadings of one or both of the litigant parties, are explained and illustrated by select examples. And here it was the author's original intention to have entered fully into the important doctrine of Presumption, but finding that this would not only run to a greater length than was consistent with the design of the work, but be in a great degree irrelevant to the object of illustrating the practice relative to the Right to Begin, which is not at all affected by presumptions of *fact;* he deemed it more advisable to treat of the matter generally, and give some instances of the principal presumptions of *law;* by which alone that right is influenced.

The second chapter contains an exposition of the practice relative to the Right to Begin, in trials by jury, both civil and criminal, and in appeals at Quar-

ter Sessions. This part has been illustrated by a great majority (if not all) the cases to be found in the books on the subject; and as the decisions are by no means uniform, and recollecting the maxim—"judiciis posteriorbus fides est adhibenda," it has been thought advisable, in most parts of the work, to give the date of each case, as well as the book from whence it is quoted.

The third chapter treats of the practice relative to the Right to Reply in the three sorts of proceedings already mentioned.

The author is aware that about some of the points touched on in the course of this work considerable difference of opinion exists, while, not unfrequently, the advocates of the most opposite views are enabled to quote judicial authorities, and even regular decisions in their favour. When this has been the case, he has endeavored fairly and impartially to give the arguments and authorities on both sides, and also the expression of his own opinion as to the side towards which the preponderance lies, in the confident hope that the conclusions to which he has thus arrived will be approved of by those in the profession who are best capable of judging and pronouncing upon them.

EDITOR'S PREFACE.

In offering an American Edition of this unique treatise to the profession the editor offers the excuse of a desire to aid and facilitate the investigation of the abstruce questions which arise and demand disposition, momentarily, in the heat of a trial. The editor has expanded the book, not unwisely it is hoped, by introducing more matter which is incidental and correlative to the principal subjects of the book for the purpose of ready reference in considering questions which inevitably arise in discussing these subjects. The editor flatters himself that by his diligence he has been able to collect and present all the authorities, English and American, which reflect on the subjects and has actually succeeded in rendering a useful book more useful.

J. J. C.

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CHAPTER I.

OF THE ONUS PROBANDI.

Every controversy, (1) legal or otherwise, must ultimately resolve (2) itself into this, that there are some one or more points (3) or facts

1 If it appears on the record that issue has not been joined, the jury must be discharged. Bent vs Benyon 6 C. & P. 216,—and it is said, "that a judge should not even by consent of parties allow an issue to be tried which the record does not properly raise." Ellison vs. Isles 11 Ad & Ell. 665, Shuf vs. Stilwell 6 Halst (N. J.) 282.

2 The object of pleading is to point out or "*ascertain* the subject for decision 4 Minor's Inst. 887. This is accomplished by alleging with legal certainty. "*the legal effect of the facts and not the facts themselves*, Dyell v Pendleton 8 Cow, 729,—" not strictly the bare conclusions of law themselves derived from the circumstances of the case, but rather combinations of fact and law, or the facts with a legal coloring and clothed with a legal character Pomroy's Rem., &c., § 511.

Chief Justice says McAlister vs Kuhn 6 Otto 87 on the sufficiency of the allegation.—"*The defendant without his (plaintiff's) consent and wrongfully took said shares and converted them unlawfully and wrongfully to his own use*—"that for the purposes of pleading the ultimate fact need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purpose of evidence, but they have no place in pleading We think that the complaint does state all the facts necessary to constitute a cause of action." The "ultimate fact distinguished from mere evidentiary matter, Cowin vs. Toole 31 Iowa 513. Singleton vs. Scott 11 Id 589; Gates vs. Salmon 46 Cal 361, 379, King vs. Enterprise Ins. Co. 45 Ind 43.

3 "Point" is all the singleness required in pleading; and the "certain material point" need not consist of a single fact, but of dependent facts constituting a proposition;—that they must have relation to each other and be so dependant and connected as to render it necessary to state them all in order to make out the "point" Cooper vs. Hermance, 3 Johns, 318; Briggs vs. Dorr 19 Id., 96 Tucker vs. Ladd 7 Cow, 452.

Co. Lit, 125; Simonton vs. Winter 5 Pet. 141; Robinson vs. Rayley 1 Burr 319; Stewardson vs. White 3 Har & M. 455; Obrien vs. Saxton 2 Barn & Cress, 908; McClure vs. Erwin 3 Cow, 327; Car vs Hinchcliff 4 Barn, & Cress 553.

asserted by one of the disputant parties, which are denied or contested by the other (4).

4 In § 5 *et passim*, It is held that "the affirmative of the issue means affirmative in substance * * * the substantial question between the parties &c. And in examining the issues made by the parties legal *materiality* and substance alone will be considered Howe vs. Lawrence 2 Zeb 99; and where the declaration would remain good after striking out a particular allegation, a plea tendering issue on such allegation is considered bad Jackson vs. Allaway 6 Man & Gr. 950; Turnley vs. McGregor Id 46; Wallis vs Warren 4 Wels, H. & G. 361; and pleas which traverses such allegations are bad in substance, Dicker vs. Jackson 6 Man. Gr. & S. 114; Hudson vs. Huslam 7 Man. Gr. & S. 837; Mills vs. Blackall 11 Ad & El N. S. 358; Bird vs. Holman 9 M & W. 762; Bradley vs. Eyre 11 Id., 449 The traverse denial or issue should be confined to the material proposition alleged, and be coextensive with it and no more, Baden vs. Flight 3 Bing N. C. 685, Newen vs. Gill 8 C. & P. 367; Bishton vs Evans 2 C. M. & R. 12; but where several facts combine to constitute one proposition, it is no violation of the rule to traverse all, for all must be proved Robinson vs. Raley 1 Burr 316; O. Brian vs. Saxon 1 B. & Cr. 908; Patcher vs. Sprague 2 Johns, 462. But see generally where pleas must be confined to a connected point instead of single fact Gould's Pl. 420 & 4, Tibbets vs. Tilton 23 N. H. 120; Harker vs. Brink et als 4 Zab 343; Tucker vs. Ladd 7 Cow 450; Strong vs. Smith 3 Cai 160; Toney vs. Field 10 Vt., 353, consult Index—Titles Duplicity—and Strike Out.

The traverse must not be too large by involving damages Jones vs. Lees 1 H. & N. 194; matter of aggravation Leach vs. Medgly 1 Lev, 283; 1 Chit, Pl, 645 inducement,—explanatory introduction Gladstone vs. Hew 1 Crompt & J. 568, and generally questions of mere quantity, time, place or other circumstances, which, though they form part of the alligation traversed are immaterial to the merits.

In an action on a policy of insurance of a *ship and tackle*, if the traverse be of the loss of the ship and tackle, it is bad as being too large; for it ought to be in the disjunctive, *ship or tackle*, as the plaintiff is entitled to recover for any part lost Newhall vs. Barnard Yelv 225; Goram vs. Sweating 3 Saund, 205 4 Minor's Inst. 928.

In an action for cutting down a mill dam,—plea, that the dam was erected without due authority of law, and obstructed a public road and ford, so that the citizens of the Commonwealth could no longer use the same, as they were accustomed to do. Reply that the dam did not *entirely obstruct* the public road and ford and that citizens &c., were not *altogether prevented* from using the same. This was held to be too wide a traverse, tending to raise an immaterial issue upon the *extent of the obstruction*, whereas any obstruction at all was illegal, and justified the defendant's conduct Dimmett vs. Eskridge 6 Munf. 308

Now the principles of natural reason clearly point out, that where there are no antecedent grounds for supposing the assertion or denial of one party more probable than the assertion or denial of the other, and where the means of proof are equally

Moore v Boulcott 1 Bing N. C. 404; Stubbs vs. Laison et als, 1 Mees & W 728; Bradley vs. Bardsley 14 Id 728; Smith vs. Lovell 10 Com. B. 23, 24; 4 Minor's Inst 929. Another common vice which tends to destroy certainty as to the legal effect of the issue occurs when the plea negatives in the very words of the declaration, or pleads conjunctively, leaving the plea pregnant with mischievious admissions not excluded by the plea; as when the complaint alleged that *the plaintiff did certain work and labor at the request of the defendant*;—a plea denying that he performed such work and labor at the request of the defendant, —admitted the performance of the services by the plaintiff, Bradburry vs. Crouise 46 Cal. 287,—and a finding of fact in opposition to such admission will be set aside on appeal. Morton vs. Warings Heirs 18 B Mon, 72, 82; Howard vs. Throckmorton 48 Cal 482 In Young vs. Catlett 6 Duer 442, Woodruff J says "A denial that A and B and C and D were present on a certain occasion is no denial that B was present, or that A and B were present and so as to either. A denial that A went to Rome and to Egypt and to Jerusalem, and returned from Jerusalem to New York, is not a denial that A went to Egypt." See Kay vs. Whittaker 44 N. Y. 565; Harris vs. Shoutz 1 Mont. 212; Doolittle vs. Green 32 Iowa 123; First Nat. B'k vs. Hogan 47 Mo. 472 Schaetzel vs. Germ, &c. Ins. Co. 22 Wisc. 412; Pollgieser vs. Done 16 Minn. 204; Lynd vs. Pickett 7, Minn. 184.

The traverse must not be too narrow, but must actually answer all it undertakes to answer and leave nothing material unanswered Paymaster General vs. Reader 4 Wash. C. C. R. 678; Flemming vs. Hoboken 11 Vr. 270; Lord vs. Brookfield 8 Id. 552; Clark vs. Logans 2 Man. & Gr. 167; Stemmers vs. Yearsley 10 Bing 35; Davis vs. Cary 15 Q. B. 418, Davies vs. Ashton, 1 Man. Gr. & Sc. 746; Hammond vs. Colls 1 Id. 916; Jones vs. Stevenson 5 Munf. 1; 4 Minor's Inst 913.

A traverse of a mere conclusion of law which does not include matter of fact material to the right is bad, Clearwater vs. Meredith 1 Wall 25; Bishop of Meath vs. Marquis of Winchester 10 Bligh N. S. 479; Rogers vs. Spence 12 Cl. & Fin 717; Ransford vs. Copeland 6 Adol & El 492,—and it is said that issues submitted to a jury should be in language so plain that no doubt can arise as to their meaning, Morris vs. Morris 28 Mo. 114, and the time of the court should not be occupied with vain and useless speculation as to the meaning of ambiguous terms., Williams vs. Jarman 13 M. & W. 135 Dyster vs. Battye 3 Barn & Ald 448.

accessible to both, the party who asserts the fact or point in question should be expected to prove his assertion; the onus probandi or burden of proof is said to lie upon him, and the party who denies it ought not to be called on to give any reasons or evidence to prove the contrary, until the other has laid at least some probable grounds for inducing a belief of his position.

This rule not only has its origin in the very nature of things and grounds of one's belief, when metaphysically considered, but is one, the justice and convenience of which, are so obvious to the human mind, that besides being acted upon in every well-regulated system of controversy and discussion, it has been incorporated into the jurisprudence of every enlightened country, *2 (although perhaps not *expressed in the same words as above) and been from the earliest times recognized and adopted into our own.

§ 2. Although this is a principle which pervades generally both our law and practice, yet in our present volume it is only proposed to consider its application as influencing the rights of the respective litigant parties to begin the case and give evidence in trials by jury, and in those cases before courts of quarter sessions in which they have peculiar jurisdiction, and may in a certain sense be considered to be sitting as a jury. And here it may be well observed, that "the precision of allegation which is required by the English rules of special pleading (1) is particularly well calculated to ascer-

1. Because it formulates the issues so as to present the propositions to be proved contradistinguished to those which stand proved by intendment of law.

It is a fundamental rule of pleading that a material fact asserted on one side, and not denied on the other, is admitted, i. e. proved. Simmons vs. Jenkins, 76 Ill. 482; Dana vs. Bryan, 1 Gilman, 104; Pearl vs. Welman, 3 Id. 311; Briggs vs. Dorr, 19 Johns, 95; Jack vs. Martin, 12 Wend. 316; Raymond vs. Wheeler, 9 Cow. 295, and notes to last section. And a special plea is any ground of defence which admits the facts in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove or disprove in the first instance on the general issue. Bk. of Aub. vs. Weed, 19 Johns 302; Ott. vs. Schrappel. 3 Barb. 59; Maggurt vs. Hansbarger, 8 Leigh. 537; Balt. & O. R. R. Co. vs, Polly, Woods & Co., 14 Gratt, 454.

Its essence is its *admission* by failure to deny or otherwise,—and its *affirmative*

tain the incumbency of the proof, which is to be made by the respective parties; and the principles which regulate the obligation of proof where strictness of pleading is required, may frequently assist in the exposition of the law, where the allegations are of a more general nature." (*a*)

We will therefore proceed to consider more in detail, and illustrate by apposite examples, that rule which has been expressed above in its fullest degree of generality.

(*a*) 2 Ev. Poth. 143.

declaration of avoidance; and up to this point there is nothing for the jury to do, as they are only called into requisition when there is *conflict of evidence*, Carnes vs. Platt, 1 Sweeny (N. Y.) 146; Haynes vs. Thomas, 7 Ind. 38; Gillespie vs. Buttle, 15 Ala. 276; Swarlswelder vs. U. S. Bk., 1 J. J. Marsh, 38; and since the testimony must consist of specific facts included under generic allegations, McAlester vs. Kuhu, 6 otto 87; Hamilton vs. People, 27 Mich. 193, Shain vs. Markam, 4 J. J. Marsh, 578, it is necessary that the allegation should also conflict,—hence the issue, consisting of an assertion of the contradictory of the proposition asserted by the opposite party. Whalely's Logic, B. 11. Ch. 11, § 3. The effect of these evidential—specific facts upon the consciousness of the jury, this treatise has no concern. The question of the Right to Begin is a question of law—jurisprudence contradistinguished to logic. The rights of the parties from the legal intendment of the pleadings, is a question of law for the court to act on as in case of a special verdict or affirmatively admitted facts. Jones vs. Brown, 1 Bing. N. C. 484; Coffin vs. Knott, 2 Greene (Iowa) 582; Grubb vs. Remmington, 7 Wis. 349; Freeman vs. Curran, 1 Minn. 169. They will render judgment by way of a *summary demurrer*, Burrall vs. Moore, 5 Duer. 654; Livingston vs. Hummer, 7 Bosw. 675. Testimony will not be received to contradict an express or implied admission of the pleadings. Page vs. Willets, 38 N. Y. 31; Robbins vs. Codman, 4 E. D. Sm. 325. So if a defence be properly set up it will prevail, even though the plaintiff's evidence inadvertently establish it, Brazell vs. Isham, 2 Kern (N. Y.) 9, as the court is bound to act on the pleadings, Develle vs. Roath, 29 Ga. 733.

For these reasons it is said the burden of the issues rests upon the party who would be defeated in the action of no proof were offered. Kent vs. White, 27 Ind. 390; Veiths vs. Hagge, 8 Iowa 163. So where a defendant appears and pleads an affirmative plea in bar, and afterwards makes default at the trial, judgment by default may be entered against him, Stapp vs. Thompson, 1 Dana 214; Schooler vs. Asherst, Id. 216, and if, after pleading, a party withdraws his appearance by leave of the court, his pleas go with him, and judgment may be entered by default. Carver vs. Williams, 10 Ind. 267.

And here it will be easily perceived, that as that rule consists of three parts, there are three distinct cases to be considered. 1st. Where there is neither any antecedent reason for believing the allegation of one party more probable than that of another, and where the means of proof are equally accessible to both. 2nd. Where though the means of proof are equally accessible to both, yet there are some antecedent grounds for believing the allegation of one party more probable than that of the other. 3rd. Where the means of the proof of his allegation are directly and imme- *3 diately in the power of one party, while the other, *from the very nature of the question, lies under considerable difficulty in giving any evidence of the truth of his. Of these three it is proposed to treat in their order.

§ 3. In the first of them, then, viz. Where there is neither any antecedent reason for believing the allegation of one party more probable than that of the other (1), and where the means of proof are equally accessible to both, that principle applies which is rec-

1. The author here confounds presumptions of law with presumptions of fact. Presumptions of law derive their force from jurisprudence, and relieve either partially or wholly the party invoking them from producing testimony Presumtions of fact require the production of evidence as a preliminary. It is held as a matter of law that they *must rest on established facts.* Tanner vs. Hughes, 53 Pa. 289; McAlier vs. McMurry, 58 Id. 126; O'Gara vs. Eiseulobar, 38 N. Y. 296; Richmond vs, Aikin, 35 Vt. 324.

The former is law for the court, the latter is reasoning, argument, logic for the jury. We are essaying to deal with the former not the latter. The burden of the affirmative of the case as stated, as a legal conclusion, intendment, or presumption, not the burdenof proof, as to its probative or convincing quantity or quality. When the parties have formulated a controversy by pleading—all the legal intendments are then fixed which never change, because jurisprudence is uniform and universal, until it is changed by jurisprudence itself. This is accomplished by a verdict which may confirm or destroy the legal intendments and presumptions of right in the pleadings. The author's "*neither any antecedent reason for believing the allegation of one party more probable than that of the other,*" relate to the processes of evolving a verdict,—purely a question of consciousness,—of reasoning, of logic and not law, except so far as presumptions of fact, burden of proof—*prima facie* case are governed by legal principles based upon logical processes.

In Powers vs. Russel, 13 Pick. 76, Shaw C. J. says: "It may be useful to say a word upon the subject of the burden of proof. It was stated here, that the plaintiff had made out a *prima facie* case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true.

Where a party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. (Judge Catron in the U. S vs. Wiggin, 13 Pet. 374, says. *What is prima facie evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose. Kelly vs. Jackson, 6 Pet. 632).* Therefore, the other party, if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail.

Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof (*meaning the burden of the affirmative of his case or issue as a whole*).

It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof (*legal affirmative on the pleadings*) gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and distinct proposition which avoids the effect of it, there the burden of proof shifts, (*the legal affirmative shifts*), and rests upon the party proposing to show the latter fact.

To illustrate this:—*prima facie* evidence is given of the execution and delivery of a deed, contrary evidence is given on the other side, tending to negative such fact of delivery, this latter is met by other evidence, and so on through a long inquiry. The burden of proof (*of the affirmative*) has not shifted, though the weight of evidence may have shifted frequently; but it rests on the party who originally took it. But if the adverse party offers proof, not directly to negative the fact of delivery, but to show that the deed was delivered as an *escrow*, this admits the truth of the former proposition, and proposes to obviate the effect of it, by showing another fact, namely, that it was delivered as an *escrow*. Here the burden of proof (*of the affirmative*) is on the latter. Ross vs. Gould, 5 Greenl, 204, Brooks et. als. vs. Barrett, 7 Pick. 94, 99, 100.

Church Ch. J. says in Heineman et. als. vs. Heard et. als, 62 N. Y. 455: "During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said, the burden of proof is then shifted. All that is meant by this is, there is a necessity of evidence to answer the *prima facie* case, or it will prevail; but the burden of maintaining *the affirmative of the issue* involved in the action is upon the party alleging the fact which constitutes the issue, and

ognized both in the civil law and our own as the great general rule by which the burden of proof is regulated, i. e. that it lies on the party who asserts the affirmative of the issue or point in question, as the case may be, to prove his allegation, and not upon him who merely denies that assertion to prove his negative (*b*). Thus, "he who alleges himself to be the creditor of another, is bound to prove the fact or agreement on which his claim is founded when it is contested; and on the other hand when the obligation is proved, the debtor who alleges that he has discharged it, is obliged to prove the payment" (*c*). "In an action against an executor, where the defendant pleads *plene administravit* (2), and the plaintiff replies (either generally or specially) that the defendant had assets; it lies upon the plaintiff to prove this assertion, and not upon the defendant to show that

(*b*) Vide Dig. 1, 22, tit. Probet. Hub. Prœl. Juris Civillis, 1. 22. t. 3, p. 2. Co. Litt. 6 b, and a number of authorities there cited from the Year Books; Vin. Abr. Evidence, L. a.; Gilb. L. E. 148. B. N. P. 297; 1 Phill. Ev. 147; 1 Stark. Ev. 376; Ross vs. Hunter, 4 T. R. 33, 48; Calder vs. Rutherford, 3 B. & B. 202. The rule as to onus probandi appears to have been established as early as the reign of Charles the First, as Lord Keeper Littleton, in his reports in C. P. Trin term. 3 Car. 1. 36. says, "In evidence al jury fuit dit per curiam, qui il que affirm le matter in issue, doet primierment faire le proof al jury.

(*c*) 2 Ev. Poth. 143.

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this burden remains throughout the trial. Lamb vs. Cam. & Am. R. R. Co., 46 N. Y. 271. The question of negligence depended upon all the evidence, as will that which constituted a *prima facie* case against the defendants, as all the other evidence produced by the plaintiff tending to corroborate, and by the defendants tending to answer the charge; and the jury should have been satisfied from the whole case that the plaintiff's allegation was proven." Brown vs. Kentfield, 50 Cal. 129.

So that a party has a right of beginning in the first instance who holds the affirmative of the case by virtue, not of any "probabilities" of fact, but by reason of the assumption of law that all uncontroverted facts in the pleadings are established.

2. So held in Bentley vs. Bentley, 7 Cow. 704; and it is also well settled that one executor is not chargeable with assets which come into the hands of his co-executor, but only with the assets which come into his own hands, Douglass vs. Satterlie, 11 Johns 21, Hargthrop vs. Milforth, Cro. Eliz. 318, Elwell vs. Quash, Str. 20, and when assets have once come into his possession he is answerable for the due administration of them even if he deliver them over to his co-executor,

Crass vs. Smith, 7 East. 246; and it is also equally well settled that each executor has the control of the estate, and may release, pay or transfer, without the agency of the other,—and that executors and administrators stand on the same ground, and their powers and responsibilities, in respect to each other, the same, Jacob vs. Harwood, 2 Ves. Sr. 267, Douglas vs. Satterlie, supra, 1 Overt. (Tenn.) 385, State vs. Collier, 15 Mo. 293.

But as the common law plea of *plene administravit* has been changed by statute in most States, it is thought the following opinion by Judge Dillon in 1 Dill. Cir. Ct. 16, will warrant insertion here.

"This is an ordinary action against an administrator upon the contract of indorsement made by his intestate. The plaintiff seeks simply judicially to establish his claim against the estate. The statute of Missouri in terms declares that "Any person having a demand against an estate, may establish the same by judgment or decree of some court of Record, Genl. St. 1865, 502, § 8. The right of the plaintiff to bring this action is clear and undisputed, Payne vs. Hook, 7 Wall. 425.

Each of the pleas demurred to is, in form and substance, a common law plea of *plene administravit*, viz.: that the defendant has now no assets of the decedent, but had, before the commencement of this action fully administsred the same The demurrer raises the question, whether, under the laws of the State of Missouri, the plea of *plene administravit* is a defence, or presents an issue which it is proper to try in an action of this character, to wit.: an action merely to establish the validity and amount of the debt against the estate.

The modes of the administration of the estate of deceased persons in England and in most of the American States, are, in many respects, very different. In England if an administrator suffered a judgment to go against him by default or failed to plead that he had fully administered, such a judgment was held to be a conclusive admission by the administrator that he had assets sufficient to pay it, and in effect bound the administrator personally, and amounted to an appropriation of such assets to the payment of the judgment. Hence, the reason, and also the necessity for such a plea.

Not so, however, here. Whether the administrator does or does not defend, he is not bound personally, and there is no judgment *de bonis propriis*, and no execution against either the goods of the administrator or of the decedent. The judgment simply establishes the debt and orders it to be paid by the administrator in due course of administration. Armstrong vs. Cooper, 11, Ill. 570, Laughlin vs. McDonald, 1 Mo. 648.

Under the laws of Missouri, the administrator is liable only to the extent of assets received, and for waste and mismanagement. The statute classifies the debts against the estate, and directs the mode and order of payment by the administrator. A judgment, such as the plaintiff seeks, is no evidence that the ad-

he had not any (*a*), although in a very old case it was held otherwise (*b*). And in an action for a loss (*c*) occasioned by a barratrous act in the master of a ship, where it was objected by the defendant that the plaintiff ought to prove that the master was not also the *4 owner or freighter, and that he did not act under *the direction of the person who was, (in which case barratry could not be committed), it was held by the court in banc, that if the master was the owner or freighter, or acted under the direction of the owner, the onus of proving that fact lay on the defendant, and Buller J. said, "it was not incumbant on the plaintiff to prove that the captain was not the owner, for that would be calling on him to prove a negative, and if the captain was not the owner it is immaterial who was; proof of the fact which operates in discharge of the other party lies on him." (*d*).

(*a*) Peak's Ev. 370; 1 Stark. Ev. 377.

(*b*) Dean and Chapter of Exeter v. Trewinnard, Dy. 80.

(*c*) This was an action against an under-writer upon a policy of insurance on goods on board the Live Oak, whereof was master Joseph Rati, at and from Jamaica to New Orleans. The first count in the declaration, which was in the usual form, contained an averment that the ship "before her arrival at New Orleans was, together with the goods, &c., by the barratry of the said Joseph Rati, he then and there being master of said ship, &c., ran away with, and wholly lost to the plaintiff, &c." by the terms too of the policy, the underwriter contracted to indemnify the plaintiff against the barratry of this very man.

Ashurst J. said "The question is, whether the plaintiff's evidence was sufficient to be left to the jury as to the barratry of the master? As to which the facts stand simply thus: The ship in question was put up as a general ship of which Rati was stated to be the master; that, *prima facie*, then supposes him not to be the owner.

Then the rule of evidence applies in this case, that the affirmative is always to be proved by those whose interest it is to prove it. Here it was the plaintiff's interest to prove that Rati was the master, which he did accordingly; if then it were for the defendant's interest to prove that he was also *owner*,—it was incumbent on him to show it; but there being no evidence of that sort, the jury did right in finding him guilty of barratry on the facts which were in evidence before them."

(*d*) Ross vs. Hunter, 4 T. R. 33, 38.

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ministrator has assets or that he has been guilty of any default, and any inquiry of that kind in an action, such as the present, is entirely collateral, and it does seem to us most manifestly improper.

For the reasons above given, the courts in other States have held, under statutes like that of Missouri, that a plea of *plene administravit* is not a good plea. Allen & wife vs. Bishop's Ex'rs, 25 Wend. 414, Raker's Ex'rs vs. Gainer's Ex'rs, 17 Id. 559, Butler vs. Hempstids, Adm'rs, 18 Id. 666, Judy vs. Kelly, 11 Ill., 211."

§ 4. In order however to guard against misconception or misapplication of this general rule, two things must be carefully attended to. First, not to confound negative averments or allegations in the negative, with those negatives which traverse affirmative allegations; and secondly, to observe that the affirmative of the issue, as understood in practice, means the affirmative of that issue in substance, (1) and not merely the affirmative in form. With

1. "Substance of the issue means the legal intendments arising out of the facts set forth in the pleadings. Affirmative pleading contradistinguished to negative pleading, may be conducted by negative propositions in Logic, but with no more facility, however, than negative pleading, by affirmative propositions; and they derive their affirmative or negative qualities from the nature of the controversy which they develope and formulate when considered in opposition to each other; and it is only by considering them together, and correlated, that the "substance" for the purpose of determining the burden can be determined. To illustrate:—if one assert that he is rightful heir, so far it is affirmative. But if another plead to this allegation, that he was not born in lawful wedlock, it becomes at once, and by virtue of the plea, negative, and stands proved until the party affirming illegitimacy remove the presumption against illegitimacy by proof, If in an action against the maker it is alleged that the payee endorsed the note, to the plaintiff, the holder, it is affirmative, and on the general issue would require proof; but if a special plea be interposed alleging that the note had never been delivered, the declaration would become negative, because the plea has relieved it from the necessity of proof, by stating a defence, against which, there is a legal presumption which he must assume to remove, as the law presumes in favor of the indorsee, the holder. So the affirmative may be in the negative form in the first instance for the purpose of overcoming a presumption of law,—as if a suitor allege that his son was not emancipated,—this must be maintained as an affirmative in pleading against the plea, that he was emancipated, for a state of freedom is presumed against slavery which must always be proved. So if one allege that his house is not liable to a particular servitude, or that money paid was not due and owing—for money paid is presumed to be done in accordance with duty. 70 N. Y. 604.

And, generally, where the right of action is founded on a negative obligation, the burden of proving the negative is upon the plaintiff. Algie vs. Wood, 11 J. & Spr. (N. Y.) 46. Noe vs. Gregory, 7 Daly 273.

Again, just what is alleged, and whether it be an affirmative or negative allegation, is not always obvious. It may be determined by attention to the affirmative idea tested by the nature of the proof which will support the allegation. As if it be affirmed that "a few of the sailors were saved,"—the proposition is affirmative,—because proof that two or three were saved would support the alle-

respect to the former of these, if a party assert affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does *not* exist, or that a particular thing is deficient in its nature or insufficient for a particular purpose; these although they resemble negatives are not such in reality; they are positive averments although expressed in the form of negatives, and the party who makes them is bound to establish their correctness. Thus in an issue out of Chancery, (2) directed to enquire whether certain land assigned for the payment of a legacy was deficient in value, and issue was joined upon the deficiency, the one alleging that it was deficient, and the other that it was not; it was held by the Court, (Holt C. J. presiding) that though the asserting that it was deficient is such an affirmative as im-
5* plies a negative, yet it is such an affirmative* as turns the proof on those that plead it; if he had joined the issue that the lands were not of value, and the other had averred that they were, the proof then had lain on the other side (*a*). Again, in an action of covenant against the lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises well repaired at the end of the term, the proof of the breach lies on the plaintiff (*b*). And in the case of Calder v. Rutherford (*c*), which was an action against the executors of J. S. the survivor of the two partners, on the breach of an agreement

(*a*) Beaty vs. Dormer, 12 Mod. 526. (*b*) 1 Phil. Ev. 185. (*c*) 3 B. & B. 302.

gation; but if it be alleged that "few of the sailors were saved," it would tend to negative the "saved idea," because proof that almost all were lost would support the allegation, to wit:— that the sailors as a whole were under consideration, and it is affirmed that they were not saved, but lost. Whately's Logic, B. 11, Ch. 11, § 1. So it is fundamental in the law of pleading, that the question of affirmativeness and negativeness only arises after the affirmatives, negatives and admissions are judicially interpreted according to law, for the single purpose of determining upon whom the law imposes the burden of the affirmative of the case, the issue, and consequently the right of beginning to remove the presumption.

2. It is held that the plaintiff would be called upon to prove the sanity of the party, because the court in such case would presume that the judge directing the issue had considered that a *prima facie* case of madness had been made out,

signed by Gabriel S. for the house of J. & G. S., to pay 100*l.* if the plaintiff would not consign, for one year, directly or indirectly, any quantity of repacked herrings to the London market, made up for the West India market, and in particular to the house of J. & A. M., the plaintiff was called on to prove the negative averment that he had not consigned any herrings in the manner above mentioned.

§ 5. But it is to be remarked in the second place, that by the affirmative of the issue is meant the affirmative in *substance* and not the affirmative in *form*, i. e. that the judges in examining the record in order to see on whom the onus probandi and consequently the right to begin lies, will consider not so much the form of the pleadings, as the substantial question between the parties, and will cast the onus probandi on the party with whom the real affirmative seems to lie (1). Considerable light has been

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and by ordering the party who relied upon the sanity to be the plaintiff, had intended that the burden of proof should devolve upon him. Frank vs. Frank, 2 M. & Rob. 314.

1. The above statements readily dispose of confounding "negative averments or allegations in the negative, with those negatives which traverse affirmative allegations" mentioned *ante* § 3.

The law of juridicial allegation, i. e., pleading, is *sui juris*, and does not necessarily form a part even of the law of the logic of proof.

Pleading must conform to and grow out of—issue out of the settled jurisprudence of rights and remedies.

A declaration must be formulated to comprehend, first, a presumption and second, the affirmative showing of liability.

1st. All persons are presumed to have duly discharged any obligation imposed upon them by law. Best's Ev. § 448, Sill vs. Thomas, 8 C. & P. 762. So it is held in Starr et. als. vs. Peck. 1 Hill, 270, that breach of private duty, negligence, fraud, &c., are not to be presumed. And it is held that a licensed engineer will be presumed to have obeyed the law rather than the illegal orders of a Captain McMahon vs. Davidson, 12 Minn. 357.

So it is clear that the declaration must state a case which overcomes and completely negatives this preliminary presumption. 2d. That the liability of the defendant must be affirmatively stated, whether it be based on nonfeasance or malfeasance. Dixon vs. the Columbus R. R. Co., 4 Biss. 137; Horan vs. Weiler, 41 Pa. 470. And 2nd, unless liability is clearly charged, Dickinson vs. Brick, 3 N.

J. L. (2 Penn.) 694, a presumption will be indulged against it, as in case of negligence—that it was accident or mischance, &c., Smith vs. R. R. 37 Mo. 287, Aldridge vs. Great West. R. R. Co. 3 Mann. & Gr. 515, 36 Mo. 13. A default jugement does not import liability, it is only an admission of the facts as stated in the declaration. Johnson vs. Pierce, 12 Ark. 599, Smith vs. Carley, 8 Ind. 451, Elliott vs. Smfth, 1 Ala. 74. So it is well settled, in obedience to these principles, that on a motion to arrest after verdict, nothing will be deemed to have been proved, but what is necessarily implied from what is alleged in the declaration. Harding vs. Craigen, 8 Vt. 509, Vadaken vs. Soper, 1 Aik. (Vt.) 289; Farwell et. als. vs. Smith, 1 Harr (N. J.) 136; Spiers vs. Parker. 1 T. R. 141; Marlin vs. O'Hara, Cowp. 825. But when a presumption of compliance with law is clearly negatived, and liability affirmatively charged, tested by the requirements of law, the defendant must plead negatively or affirmatively or both. But what is a negative plea? Ans.—A plea which puts the plaintiff upon proof, Wilkes vs. Hopkins et. als., 6 Man & Gr. 36,—or in other words, a plea which does not relieve him from proof, Bk. of Aub. vs. Weed, 19 Johns, 302. What is an affirmative plea? Ans.—A plea which by law relieves the plaintiff of proof, Bk. of Aub. vs. Weed *supra*, but avoids the declaration by matter which the plaintiff would not be bound to prove or disprove in the first instance on the general issue or a negative plea. And when the defendant relies on his affirmative plea, it is loaded with the same presumption against it as was the plaintiff's declaration. And the language of the law is that this presumption operates against the party who undertakes to free himself from liability. Ford vs. Simmons, 13 La. Ann. 397, Great West. R. R. Co. vs. Bacon, 30 Ill. 347, 1 Gall. 104, 150, Rex. vs. Pemberton, 2 Burr. 10, 37, Rex. vs. Sarvis, Id. 148. Bliss vs. Brainard, 41 N. H. 226. Solomon vs. Dreschler, 4 Minn. 278, Horan vs. Weiler, 41 Pa. 470. Toledo R. R. Co. vs. Pence, 68 Ill. 524, Young vs. Davis, 30 Ala. 213, Martin vs. Clark, 1 Hemst, 259. No presumptions will be indulged in favor of exemption of common law liability. Edsall et. als. vs. Cam. & Am. R. R. Co., 50 N. Y. 661; Aetna Ins. Co. vs. Wheeler, 49 Id. 616.

Beardsly J., in Costigan vs. the Mow. & Hud. R. R. Co., 2 Denio 616, said: "But first of all the defence set up should be proved by the one who set it up. He seeks to be benifited by a particular matter of fact, and he should therefore, prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions beeween him and the person wronged, should be made in favor of the latter. For this reason, therefore, the *onus* must in all such cases be upon the defendant." So it will readily be seen that the "burden" as to the pleadings means the affirmative of the case—the issue as formulated by the pleadings, and that these are statements of remediable rights and excusable and avoidable

defences as matter of legal substance to which language is not always readily and easily adapted. But language being the only vehicle in which the legal "substance" can be conveyed, legal right and remedies and defences will not in the least degree be subordinated to the infirmaties of either the language itself or the brain and head that employs it. A grammatical affirmative, by way of a double negative, as "not unfinished," "not unpaid," "not negligently," &c., will be interpreted, finished, paid, diligently, &c., if such be the clear object and purpose in an allegation. It is sometimes intimated that a negative, which asserts absence of a subjective substance or fact, although such negative or absence must be duly alleged, yet for some reason, say inconvenience, *ab inconvenienti*, the party so alleging is relieved from proof because it is negative. But this notion is without foundation in either law or philosophy. If the right of recovery or defence depends upon the absence or presence of a state of facts, it is plain that the allegations and proofs must correspond. Algie vs. Wood, 4 N. 1.

So in a controversy as to whether a certain will was in its effect,—the execution of a power in the devisor, and consequently a controversy as to the property included under the devises." Tindal C. J. said, "Whether the testator had any other real property on which the devise in question could operate, is a matter on which, it is admitted, no evidence was given on either side; and it was contended on behalf of the defendant, that if Michael Mason, of Nantwick, had no other real property than the house in Nantwick, so that the devise as to the real property would be really inoperative, unless it could operate as an execution of the power, it must be held so to operate, and that the defendant ought not to be called upon to prove negatively that Michael Mason, of Nantwick, had no other property; but it lay on the plaintiff to prove, affirmatively, that Michael Mason, of Nantwick, *had* other property on which the devise could operate; the existance of which, in the absence of any proof, was not to be presumed.

But it appears to us, that, where a party seeks, from extrinsic circumstances to give an effect to an instrument which, on the face of it, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative; for in the absence of extrinsic proof, the deed must have had its natural operation and no other." Doe. d. Caldcott vs. Johnson, 7 Man. & Gr. 1060. So on the indictment in Com. vs. Bradford, 9 Metc. 271. Shaw C. J. said, "that the burden of proof was still on the government, to prove that the defendant had no right to vote, and that he had not been an inhabitant of the city six months." In assumpsit on the warranty of a horse, when the plaintiff in his declaration averred *that the horse was not sound*,—plea that it was sound. It was adjudged that the plaintiff had the affirmative and that the *breach* must be proved, no matter what the grammatical form of the proposition. Osborn vs. Thompson, 9 C. & P., 337. So, for not loading a sufficient cargo on board a ship, Ridgway vs. Ewbank, 2 M. & Rob. 217; for not building according to spec-

ification, Smith vs. Davis, 7 C. & P. 307,—and when the defendant in an action against him for attaching exempt household furniture, has shown that the same was taken by virtue of a legal process against the plaintiff—the burden is on the plaintiff to show that enough was not left to satisfy the requirements of the law Gay vs. Southworth, 113, Mass. 333; 18 N. H. 457, 33 Id. 345. 46 Me. 457, 2 R I. 454, 22 Vt. 429. The legal sufficiency and quality of the allegations should not be confounded with the proofs,—weight of evidence,—the order and effect of them during the progress of the trial. In Central B. Co. vs. Butler, 2 Gray 132 Bigelow J. says: "The burden of proof (*meaning the affirmative of the case or issue*) and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause, —the latter shifts from side to side in the progress of the trial, according to the nature and strength of the proof offered in support or denial of the main fact (*ultimate fact*,' 6 Otto 87) to be established.

In the case at the bar, the averment, which the plaintiff was bound to maintain, was, that the defendant was legally liable for the payment of tolls. In answer to this the defendant did not aver any new and distinct fact, such as payment accord and satisfaction or releases,—but offered evidence to rebut this *alleged liability*. By so doing he did not assume the burden of proof, which still rested on the plaintiff's,—but only sought to rebut the *prima facie* case which the plaintiff's had proved against him. The ruling of the court on this point was therefore right.

The evidence that other persons going to certain premises in Dracut were allowed to pass the bridge free of toll was clearly competent, because it was in the nature of an admission by the defendants that the estate in Dracut to which these persons were going was included in the vote of the corporation exempting certain territory and persons residing thereon from liability to tolls. It being admitted that the defendant and members of his family frequently passed over the bridge to the same premises, the evidence had a direct bearing on the question at issue between the parties." See ante § 3 N. 1.

It will be seen by § 3, N. 1, that a legal presumption makes a prima facie case, and it is on this account held that an erroneous ruling during the trial, tending to deprive a party of the benefits of a legal presumption or a prima facie case is reversable error, and the error is neither waived or cured by the fact that the party upon whom the burden is improperly imposed, ineffectually attempts to make a case under the ruling; Nickerson et. als. vs. Ruger et. als., 76 N. Y. 280. It is said a party looses nothing by attempting to comply with the erroneous ruling of the court. Avery vs. Slack, 17 Wend. 85, Simpson vs. Watrons, 3 Hill, 619, Worrall vs. Parmelee, 1 N. Y. 519, Gates vs. Ward, 17 Barb. 424. The authority of the case of Philps vs. Town of Gates, U. S. C., C. N. D., N. Y., 8 Rept'r, 677, is denied. Whether the presumption or *prima facie* case actually shifts is

thrown on this subject by some recent cases, and some good rules laid down for the guidance of the practitioner. In the case of Amos v. Hughes, (*a*), which was an action of assumpsit on a contract to emboss calico in a workmanlike manner, and alleging as a breach that the defendant did not emboss it in a workmanlike manner, but on the *contrary embossed it in a bad *6 and unworkmanlike manner; to which the defendant pleaded that he did emboss the calico in a workmanlike manner, on which issue was joined; it was held by Alderson B. that the onus probandi lay on the plaintiff; that questions of this kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay; and he laid down, (what appears to be a correct rule on the subject) *that the proper test is to which party would be successful if no evidence at all were given*; (2)

(*a*) 1 M. & Rob. 494.

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a question for the jury. Coale vs. R. R, Co., Mo. 235.

The error consists in admitting or refusing the offer of testimony tending to make out a *prima facie* case or rebut or avoid testimony having such a legal tending. Niekerson et. als. vs. Rupar et. als., *supra*. See § 10, *infra*.

2. A rule, no doubt, of some convenience; but as a rule of judicial philosophy,—there is but little in it. It is absurd to suppose a party could be successful *without evidence*. There may, indeed, be no additional testimony offered by either party except such as is offered the court by the admissions and denials in the pleading. Dwille vs. Roath, 29 Ga. 733. But *ex factis oritur lex*, and it is a solecisen to assume a judgment of law independent of the facts in a case. The presumptions of fact in the pleadings are in law as effective as though found by a jury,—and such presumption of fact is sufficient proof § 11 and § 3. N. 1. So the question of Beginning must, without any hypothesis, be determined in the absence of all evidence except the admissions and denials in the pleadings, as the act itself implies. The form of the interrogatory, supposition, or expedient resorted to, to provoke the exact point of inqury can be of little practical moment provided "*the whole situation be grappled with.*"

The party who by intendments of law is entitled to judgment by the confessions and admissions in the pleadings has, except for the purpose of the amount of relief, no occasion for further testimony. This judgment, if on the part of the plaintiff, can be invoked by supposing a motion for judgment *non obstante veridicto*, Schermerhorn vs. Schermerhorn, 6 Wend. 513, if on the part of the defendant, by a motion to arrest, and both motions can be considered at the same time and in the same case. Bellows vs. Shannon, 2 Hill 88.

that in the principal case, supposing no evidence were given on either side, the defendant would be entitled to the verdict, for it was not to be assumed that the work was badly executed; and consequently that the onus probandi lay on the plaintiff. And in the case Mills v. Barber (*b*), which was an action of assumpsit by the indorsee of a bill of exchange against the acceptor, to which the defendant pleaded that the bill had been accepted without consideration for the accommodation of S. B. the drawer, and had been subsequently indorsed to the plaintiff without consideration, to which the plaintiff replied that the said S. B. indorsed the said bill to the plaintiff for good consideration, and issue was taken thereon; it was held by Alderson B. at the trial, that the onus probandi lay on the defendant notwithstanding the affirmative shape of the replication, and which ruling was now confirmed by the court in banc; and Alderson B. said, "the replication is in the affirmative, but it is in answer to a negative: upon this question *is it not the proper test to examine whether, if the particular allegation be struck out of the plea, there would or would not be a defence to the action?*"

(*b*) 1 Mees. & Wels. 425.

Under the code, either party can move for judgment on the pleadings, by way of *summary demurrer*, and the court will render judgment on the presumptions and admissions in the pleadings, § 2, N. 1, *supra*. So it is plain that the party has the burden of the case or issue, and consequently must begin—and is entitled to begin, who has the initiative to protect himself from a default on account of his admissions in the pleadings.

We have then evolved a rule out of the law of pleading, to wit, *that the onus and right or liability to begin is on the party who has relieved, by his pleadings, his adversary from proof*;—who has given color to his adversary's right by admissions or avoiding or excusing negations or traverses; Cott vs. Beaumont 31 Mo. 118, Rogers vs. Diamond, 13 Ark. 474, Davidson vs. Henop, 1 Cr. C. Ct. 280, Dunlay vs. Peters, Id. 403, Beal vs. Newton, Id. 404, Henderson vs. Casteel, 3 Id. 365, Mason vs. Croom, 24 Ga. 211, Kimball vs. Aidair, 2 Blackf., 320, Waller vs. Morgan, 18 B. Mon. 136, Judge vs. Stone, 44 N. H. 593, Pussy vs. Wright, 31 Pa. 387, Stevenson vs. Man, 9 Ill. 532, Hunter vs. Am. Pop. Life Ins. Co., 4 Hun. 794, Smith vs. Sergent, 67 Barb. 243, Gross vs. Turner, 21 Vt. 438, Cross Keys Bridge Co. vs. Rawlin's, 3 Bing. N. C. 81, Cravens vs. Sanderson, 4 Ad. & El. 666, Gougle vs. Bryan, 2 Mees. & W. 779, Harrington et.

§ 6. If the test here suggested be compared with that given by the same learned judge in Amos v. Hughes (*a*), will be found,
7* that so far from being contradictory or inconsistent, *they are the same proposition in different dresses, and only differ in this, that the latter is expressed more generally, and both are tests which apply to all cases, whether there be a presumption of law in favour of the pleading of either party or not. The second test, viz., that given in Mills v. Barber, (*b*) establishes this position, that inasmuch as the two last pleadings on any record must contain an affirmative and negative between them, (otherwise the issue is not properly joined,) the test whereby to discover on whom the onus probandi lies, is to conceive both the affirmative and negative expunged, and then consider which party would be entitled to succeed, as the onus probandi must lie on his adversary. Thus in the case of Mills v. Barber, (*b*), suppose the averment in the plea that "*the said S. B. had indorsed the bill to the plaintiff without consideration*," and the replication in answer to it that "*the said S. B. indorsed the said bill to the plaintiff for consideration*," had been both struck out of the record, the plaintiff would be entitled to recover on the merits, because he had declared as *indorsee* of a bill of exchange against the defendant as the *acceptor*, and the first part of the plea, viz., that the bill had been originally *accepted* without consideration, would of itself be no defence to an action by an indorsee, who is by law presumed to have given consideration for the bill; so that the second test applies very correctly here; and when the case came on for trial, supposing no evidence at all to have been adduced according to the test given in Amos v. Hughes, (*a*) the plaintiff must have recovered, as it lay on the defendant to

(*a*) 1 M. & Rob. 464. (*b*) 1 Mees. & Wels. 425. (*b*) 1 Mees. & Wels. 425.
(*a*) 1 M. & Rob. 464

als. vs. Bishop, &c., 4 Bing. N. C. 77; Pearson vs. Rogers, 9 Ad. & El. 303, Wilson vs. Craven, 8 Mees. & W. 593. Again, the party who would fail on the uncontroverted propositions in the pleadings must go forward, is but a complement or correlative of the test of the text in a subsequent part of this section, to wit,—to strike out the controverted allegations, and the party who would be defaulted by judgment, must proceed.

prove that no consideration had been given either for the acceptance or indorsement of the bill.

§ 7. Again, suppose that in the former case of Amos. v. Hughes (*a*), we have recourse to the second test, or that suggested in Mills v. Barber, (*b*) we shall find that it applies exactly; for if in 8* Amos v. Hughes the last affirmative and *negative, viz., the averment in the declaration that "*the defendant did not emboss the calico in a workmanlike manner*," and the counter allegation in the plea that "*he did emboss the calico in a workmanlike manner*," were both struck out of the record, the defendant must have had a verdict according to the test given in Mills v. Barber, (*b*) since there would then have been no cause of action, because no breach of contract, alleged on the record against him; and when the case came on for trial the first test applied, that if the plaintiff gave no evidence to show that the calico had been embossed in an unworkmanlike manner, and the defendant gave none to the contrary, the defendant must have succeeded, as the law would not presume in favor of the plaintiff's allegation, and consequently the onus probandi lay upon him. So that the two general rules for determining the onus probandi are, first, to conceive the negative and affirmative allegatious by which the issu- is joined both struck out of the record, and the onus probandi lies on the party against whom judgment must in their absence pass; and second, to consider at the trial which party would succeed if no evidence at all were given, as the onus probandi must lie upon the adversary (1).

(*a*) 1 M. & Rob. 464. (*b*) 1 Mees. & Wels. 425. (*b*) 1 Mees. & Wels. 425.

1. The test here suggusted seems to meet with universal approval. Taylor's Ev. § 338. Wharton's Ev. § 357. Wharton says, "Hence it may be stated as a test of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either, has him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain." Amos vs. Hughes, 1 M. & Rob. 464; Doe vs. Rowlands, 9 C. & P. 735; Osborn vs. Thompton, 9 C. & P. 337; Ridgway vs. Ewbank, 2 M. & Rob. 218; Huckman vs. Firnie, 3 M. & W. 505; Elkin vs. Janson, 13 M. & W. 655; Geach vs. Ingall

14 M. & W. 97; Ashbuy vs. Bates, 15 M. & W. 589; Mercer vs. Whall, 5 Q. B. 458; Sutton vs. Sadler, 3 C. B. (N. S.) 87; Bradley vs. McKee, 5 Crauch C. C. 298; Hatchberger vs. Ins. Co., 5 Biss. 106; Hankin vs. Squires, 5 Id. 186; Fullerton vs. Bk. U. S., 1 Pet. 607; McClellan vs. Crofton, 6 Me. 308; New Haven Co. vs. Brown, 46 Me. 418; Shackford vs. Newington, 46 N. H. 415; Kendall vs. Brown, 47 N. H. 186; Gilmore vs. Wilbur, 18 Pick 519; Beals vs. Merriam, 11 Metc. 470; St John vs. R. R., 1 Allen 544; Pratt vs. Lambson, 6 Allen 457 Boarders vs. Tooney, 9 Allen 65; Central Bridge vs. Butter, 2 Grey 130 Dorr vs. Fisher, 1 Cush, 227; Morgan vs. Morse, 13 Gray 150; Pratt vs. Langdon, 97 Mass. 97; Gray vs. Southworth, 113 Mass. 333; New Bedford vs. Hingham, 117 Mass. 445; Cotheal vs. Talmadge, 1 E. D. Smith 573; Heineman vs. Heard, 62 N. Y. 448; Huntingdton vs. Conkey, 33 Barb. 220; Ayrault vs. Chamberlaid, Id. 233; Willard et als. vs. Thorn, 56 N. Y. 442; Zerby vs. Miller, 16 Pa., St. 486; Pittsburgh R. R. vs. Rose, 74 Pa. 362; Briceland vs. Com., Id. 463; Reeve vs. Ins. Co., 39 Wisc. 520; State vs. McGinley, 4 Ind. 7; Spaulding vs. Harvey, 7 Ind. 429; Kent vs. White, 27 Ind. 390; Milk vs. Moore, 39 Ill. 584; Multmon vs. Williamson, 69 Ill. 423; Hyde vs. Heath 75, Ill. 381; Woodruff vs. Thurlby, 39 Iowa 344; Veiths vs. Hagge. 8 Iowa 163; Grummell vs. Warner, 21 Iowa 11; Burton vs. Mason, 26 Iowa 392; Day vs. Raquet, 14 Minn 273; Johnson vs. Gorman, 30 Ga. 612; Shuliman vs. Brantley, 50 Ala. 81; Hill vs. Nichols, 50 Als. 336; Brandon vs. Cabiness, 10 Ala. 155; Craig vs. Perois, 14 Rich. Eq. 150; Carver vs. Harris, 19 La. Ann 621; Fox vs. Hilliard, 35 Miss. 160; Richardson vs. George, 34 Mo. 104; Church vs. Fagin, 43 Mo. 123; Galewood vs. Bolton, 48 Mo. 78; Henderson vs. State, 14 Tex 503; Mills vs. Johnson, 23 Tex. 308; Luckhart vs. Ogden, 30 Cal. 547.

The same writer further says "If there is a case made out against the defendant, on which, if the plaintiff should close, a judgment would be sustained against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated." Tredwell vs. Joseph, 1 Sumn. 390; R. Co. vs. Gladman, 15, Wal. 401; Briggs vs. Taylor, 28 Vt. 180; Gray vs. Gardiner, 17 Mass. 188; Davis vs. Jenny, 1 Metc. 221; Attleboro' vs. Middleboro, 10 Pick. 378; Com. vs. Dayly, 4 Gray 209; Lewis vs. Smith, 107 Mass. 334; Walcott vs. Halcomb, 31 N. Y. 125; Elwell et. als. vs. Cramberlin, 31 N. Y. 611; Sullivan vs. R. R., 30 Pa. St. 235; Empire Trans. Co. vs. Wamshutta Co, 63 Pa. St. 17; Zerbe vs. Miller, 16 Pa. St. 488; Winans vs. Winans, 19 N. J. Eq. 220; Frech vs. R. R., 39 Md. 574; Gough vs. Cram. 3 Md. Ch. 119; Peck vs. Hunter, 7 Ind. 295; Kent vs. White, 27 Ind. 390; Southworth vs. Hoag, 42 Ill. 446; Adams Express Co. vs. Stellanners, 61 Ill. 184; Hale vs. Hazleton, 21 Wisc. 620; Castello vs. Landwehr, 28 Wisc. 522; Ketchum vs. Express Co., 52 Mo. 390; Zemp vs. Willmington, 9 Rich. L. 84; Steele vs. Townsend, 37 Ala. 247; Peek vs. Chapman, 16 La. Ann. 366; Hutchins vs. Hamilton, 34 Tex. 290.

§ 8. There are several other cases to be found in the books, which illustrate the position that by the affirmative of the issue is meant the affirmative in substance; thus in Shilock v. Passman, (*a*), which was assumpsit against an attorney, who, as the declaration alleged, had undertook to procure the discharge of the plaintiff under insolvent debtors' act, and charged as a breach that he did not use due diligence for that purpose; to which defendant pleaded, first, Non assumpsit; second, That he did use due diligence, &c. Alderson B. said, the second is-
9* sue is to be proved by the plaintiff, the defendant says that he did use due diligence, yet that is a negative on the plaintiff's allegation of negligence. (1) In Scott v. Lewis (*b*), which was an action of trover by the assignee of a bankrupt for some furniture, the possession of which was laid in the bankrupt before the bankruptcy, and had since been converted by the defendant; to which defendant pleaded in justification that he as sheriff took the goods under a fi. fa. which had been issued at the suit of R. G. before the bankruptcy; to this the plaintiff replied, that the fi. fa. was obtained on a cognovit actionem, which had been signed by the bankrupt in an action brought by collusion for the purpose of giving a fraudulent preference; to this the defendant rejoined, that the action was commenced adversely and not for the purpose of fraudulent preference; and per Coleridge J. "Questions of this sort must be decided more on what justice to the parties requires than on any strict rule of practice; here the real affimative is the proof of collusion, and lies on the plaintiff."

It may be here observed that this last case is not exactly in point; it seems to have escaped observation, that there was a presumption of law that no party has been guilty of fraud or covin, viz., against the replication, and therefore, as will be presently' shown, if the replication had been in the negative in the strongest terms, still the onus would have lain on the party who asserted the fraud to prove it. The case has only been introduced here to show the recognition, by the learned judge who presided, of the rule under consideration.

(*a*) 7 C. & P. 291. (*b*) ib. 347.

1. See § 3 N. I.

§ 9. The two following cases however are more directly to the purpose. In Smith v. Davies (*a*) which was an action of assumpsit for not building a certain house according to a specification, the defendant pleaded first, That he did build them *according to 10* that specification, and second, That he had by license from the plaintiff deviated from that specification; and per Alderson B. "The first issue is on the plaintiff, for though it is in point of form an affirmative on the defendant, yet it is really a negative, because it in reality denies the plaintff's averment that the defendant had not built according to the specification, a fact which, unless the plaintiff proves, he cannot recover." And lastly, in the case of Soward v. Legatt (*b*), which was an action of covenant on a demise by the plaintiff and one J. S., whereby the defendant was bound to repair a messuage, to paint the outside woodwork once every three years, and the inside woodwork within the last three years of the duration of the lease, and charged as breaches, that the defendant had performed none of the three, but had left the house dilapidated; to which the defendant pleaded that he did paint the outside woodwork every three years during the lease—specifying the times, and the whole of the inside parts that were usually painted, within three years previous to the determination of the lease, viz., at such a time, and did not leave the house dilapidated, concluding to the country. Lord Abinger, C. B. said, "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative as he pleased. I shall endeavor by my own view to arrive at the substance of the issue;" and he accordingly held that it lay on the plaintiff to prove his case (1).

(*a*) 7 C. & P. 307. (*b*) id. 613.

1. This proposition contains an element of error. When a case is presented to the pleader he has to deal with a condition of facts, whose concomitants, antecedants and consequents are all fixed and unalterable. He has to deal with

them as they are in the system of things. They cannot be made to change places like characters upon the chess-board. The law interprets them as they actually are, and pleading is a science adapted to the presenting of them as they actually exist according to their legal effect as to the remedy sought or the defence to be set up. The pleading must be adapted to the facts—not the facts to the pleading. If a condition of facts in legal intendment only amount to a negative of the plaintiffs claim as set up—no shift in pleading can make them the bases of an affirmative plea. If on the other hand, the facts are really facts of avoidance,—they cannot be negatively pleaded.

They may, by law, be available as testimony under the general issue;—but this is because in such instances the law permits a party to forego pleading altogether—General issue as matter of pleading—is a mere fiction so far as allowing affirmative defences under it. Facts which by legal intendiment are negative or affirmative respecting a given controversy cannot have their legally pleadable character changed by the mere form of pleading, State vs. Melton, 8 Mo. 415, Denny vs. Booker, 2 Bibb. 427, Chambers vs. Hunt, 3 Harr. (N. J.) 341, Marsh vs. Peire 4 Rawl. 273, as the following case will fully illustrate. Wilkes vs. Hopkins et. al., 6 Man. & Grange. 36, Assumsit. The declaration stated that, in consideration that the plaintiff would, for the accommodation of the defendants, draw a bill of exchange on them for 121 £ 10 S., and would endorse and deliver the same to them, the defendants promised the plaintiff that they would duly pay the said bill when due, and would indemnify the plaintiff against the payment of the said 121 £ 10 S, and all charges and expenses which he should bear or sustain, or to which he might be put, in respect thereof. Averment; that the plaintiff, relying, &c., afterwards, to wit: on the 25th of June, 1825, drew a bill of exchange on the defendants, and thereby requested them two months after date thereof, to pay to his order 121 £ 10 S., value received, and at their request endorsed the bill and delivered it to them; that the defendants, negotiated the same; and that afterward, to wit: on the 23d of August, 1825, when the bill became due, the defendants were required to pay the same. Breach; That the defendants did not, nor would then or any other time, pay the same, but wholly refused so to do, by reason whereof the plaintiff, as the drawer of the bill, was compelled to pay, and did pay to the holder of such bill £10 for interest and charges thereon, and paid also £10 for costs and charges incurred by the plaintiff on occasion of his being sued by such holder, and for other costs and charges. Plea by defendant Nichols that the defendants did duly pay the bill when it became due, and that the plaintiff did not bear, nor was he put to any costs or charges by reason of his drawing such bill *modo et forma* concluding *with a verification.* To this plea the plaintiff demurred specially assigning for cause, that it ought to have concluded to the country.

Dowling Serg't in support of the demurrer. submitted that the plea concluded

improperly, as it contained a direct denial of the breach of the contract alleged in the declaration.

Talford Serg't, *contra* referred to Ensall vs. Smith, 1 C. M. & R. 522; 5 Tyr., 141; Goodchild vs. Pledge, 1 M. & W. 463; 5 Dowl. P. C. 89; Moses vs. Levy, 4 Q. B. 213; as authorities that a plea of payment must conclude with a *verification*. [Maule J. This is not a plea of payment in discharge of the cause of action]. The plea contains an affirmative allegation. [Tendal, C. J. So in an action for a breach of covenant to repair; a plea, that the defendant did repair, is affirmative, but it concludes to the country]. The promise laid in the declaration is not merely to pay the bill, but also to indemnify the plaintiff against the payment thereof, and all charges and expenses to which he may be put. [Creswell, J. If the defendants, by the original contract had not been bound to pay the bill, but merely to indemnify the plaintiff, a plea of payment would not have been a mere traverse.

Tindal, C. J. The declaration contains a direct denial that the defendants paid the bill. The plea states that they did pay it. This is, therefore, simply a traverse of the allegation in the declaration, Talfordo Serg't, then prayed and obtained leave to amend.

In the ordinary plea of payment, the defendant alleges *new* matter occurring *after* a breach,—payment and acceptance in discharge of the breach. Here the payment negatives the breach itself.

At common law, a plea, replication, or subsequent pleading, which contained *new affirmative* matter, concluded with a verification—an assertion of the ability of pleader to prove the matter alleged, (though without actually producing his *secta*, as in declaring, which he might not be prepared to do)—and a prayer of judgment, by which the adverse party was invited to answer him.

Secondly—when the affirmative in the plea, &c., merely traversed a *negative* allegation of the adverse party, the conclusion was to the contrary.

Thirdly—when the plea, &c., contained *new negative* matter, it concluded with a prayer of judgment; but without a *verification*, there being nothing for the party pleading such a plea to prove. Bodenham vs. Hill, 7 M. & W. 274. Parke, B., said "I think the good sense of the matter is, that a party should not be required to verify that which it does not lie upon him to prove."

Fourthly—when negative matter in the plea, &c., merely *traversed affirmative matter* in the declaration, &c., the plea, &c., concluded to the contrary.

In the principle case the former part of the plea belongs to the second, the latter part to the fourth, of these divisions.

In framing the new rules of pleading (H. 4, W. 4, 3 Nev. & M. 5, 10 Bing. 467) the judges, when they discarded the prayer of the judgment, appear to have considered that the termination of every pleading would still be distinctly marked, either by tendering a verification, or by praying a jury, and to have left

§ 10. If any of the four last cited cases, or indeed any of those which follow, be tried by either of the tests which are given in 11* Amos v. Hughes, (*a*) and Mills v. Barber, (*b*) the results will *be found to tally exactly with those given by the decisions of those cases; an additional proof, if any were wanting, of the extreme correctness and universality of those rules.

We have hitherto been proceeding on the supposition that the affirmative and negative allegations which compose the issue. were propositions which enjoyed an equal share of probability, *i. e* in the absence of all evidence on either side, the mind would suppose one quite as likely to be true as the other (1). This, however,

(*a*) 1 M. & Rob. 494. (*b*) 1 Mees. & Wels. 426.

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the pleadings coming within the third of the above classes unprovided for. So *non infregit conventionem* (has not broken his contract), which is a double negative, equivalent to *tenuit conventionem* (he has perfermed his contract) is, in a few cases when the plea is allowed properly concluded to the contrary. *Reporters.* The sum of the matter is, the pleading must be adapted to the proof—the touchstone of which is the burden of proof. Seargeant J., in Judge, &c., vs. Stone, 44 N. H. 603, says, "Chesley vs. Chesley, 37 N. H. 229, was where there was no proper pleadings in the case. Each party had made a statement before a commissioner, and it was found that the substance of the defendants' statement, was a general denial of the plaintiff's case, and amounted substantially to the general issue, and hence that the plaintiff should begin and close. The head note in this case, and some expressions in the opinion, go farther than the facts in the case warrant, or the authorities quoted will justify. What the case decides is,—that the court will consider the substance of the pleadings more than the form, and will consider what is the substantial fact to be proved, and on whom it rests to prove it; and if the primary burden of proof rests on the plaintiff, he must, of course, begin, and shall have the right to close.

The attention of the court was only called to the issue formed by the defendant's pleading to the plaintiff's declaration, and if anything was in that way left for the plaintiff first to prove, he was entitled also to close."

1. As shown in § 3 N. 1 & § 5 N. 1, ante, there is no presumption of the absolute truth of either party's allegation when controverted any farther than to impose the burden of the case, i. e., the burden of proof upon one party or the other; except, perhaps, where the court will take judicial notice of the absolute truth or falsity of the proposition contained in the allegation,—such as a plea contradicting the record or imputing fraud to the court. Middleton vs. Ames, 7 Vt., 168,—or false, in fact. Stewart vs. Hotchkiss, 2 Cow. 634, Richley vs.

Proove, 1 Barn & Cr. 286, Claflin vs. Griffin, 8 Bosw. 689. The court has power to strike out a defence as sham upon the sole ground that it is false. McCarty vs. O'Donnell, 7 Robt. 431, Slack vs. Cotton, 2 E. D. Sm. 398. But the quantity and quality of the proof at the trial as influencing the burden at subsequent stages of the investigation is what the learned author is preparing—laying the ground to illustrate and explain. The initiatory burden conferring the right of going forward and opening the case before the jury, and producing testimony sufficient to establish his prima facie case at least, or so much as to change the burden on the face of the pleadings, must be determined as matter of law in the first instance from the pleadings by the legal admissions and denials. The character of a suit is determined by the declaration and not by the plea, Lyon vs. Mottuse, 19 Ala. 463, Welsh vs. Darrah, 52 N. Y. 590, and it must be assumed that the pleader has stated his claim as strongly as he can safely, Bartlett vs. Prescott, 41 N. H., 493, and where a party has, by his own fault, led another into a mistake in pleading, he cannot take advantage of his own wrong. McPherson vs. Melhinch, 2 Wend. 671, Sands vs. Bullock, Id. 680. So it is held, that averments of material and traversible facts should be certain and positive, Hart vs. Rose, 1 Hemst. 238, that the burden of the issue may be clear. The right of opening statement and proof, as will be seen in a subsequent part of this treatise, is the legal effect of the burden caused by the leading intendments resulting from the proper interpretation of the admissions and denials in the pleadings.

Hornblower, C. J., in Chambers vs. Hunt, 3 Harr (N. J.) 341, says, "It is a rule founded in reason, and the nature of things, that the party holding the affirmative of the issue, must begin the proof and is entitled to the open and reply, Cooper vs. Wakely, 3 Car. & P. 474, Hodges vs. Holden, 3 Camp. R. 366, Doe. vs. Corbett, Id. 368, Jackson vs. Hasketh, 2 Stark, R 518, Revett vs. Braham. 4 T. R. 497, Bedell vs. Russell, Ry. & Mo. 293, Cotton vs. James, 3 Carr. & P. 505.

Indeed, I do not know an exception to the rule, and it is the same in replevin as in other actions. It is so laid down by Mr. Chitty, in his general practice. Tit. Rep.,—by Bailey, J. in.. 2 Stark. R. 518,—by Lord Tenterdon, C. J., in Curtis vs. Wheeler, 4 Car. & P. 196. So, too, in Williams vs. Thomas, Id. 234, Rogers vs. Arnald, 12 Wend. 36, and Marsh vs. Pier, 4 Rawl, 273. I have cited these cases for the sake of reference, not because I suppose the learned judge, before whom the cause was tried, was ignorant of the rule which gives the opening and reply to the party holding the affirmative. His error lay in supposing that in this case the defendant held the affirmative side of the issue. Some embarrassment has arisen on this point, from denominating the plea in this case, a special plea in bar. It is not such, correctly speaking.

A special plea in bar admits and avoids. It admits all the material allegations in the declaration, and then by setting up—affirmatively, some new matter

consistent with those allegations, but taking away the plaintiff's right to recover. Hence, upon a replication denying such new matter and concluding to the country, the proof invariably lies on the defendant. Infancy, coverture, payment accord and satisfaction, or a release, are all familiar instances of a special plea in bar. Such pleas admit the facts stated in the declaration, and consequently, the matter pleaded in bar being new and affirmative matter, must, if it is denied by the replication, be proved by the defendant, as pleaded.

But the plea in replevin, of property in the defendant, or a third person, and not in the plaintiff is not an affirmative plea—it admits nothing—it does not even admit the taking, Marsh vs. Pier, 4 Rawl's, R. 273, 288, Gilb. on Replev. 127 Such a plea is wholly negative in its character,—it denies the plaintiff's title and takes away his right to deliverance,—it necessarily compels the plaintiff to rear firm his title and consequently to prove it on the trial."

But the shifting presumptions of fact changing the burden at the trial is well illustrated by Polland, C. J., in Gross vs. Turnor, 21 Vt. 439. He says: "The defendant had pleaded the general issue, and this, of course, required the plaintiff to take the lead in the testimony, so far as to establish, *prima facie*, his right of action against the defendant. So far as the defendant proposed to dispute the plaintiff's right to recover against him, by directly denying or rebutting, what the plaintiff had thus proved against him, he was bound to do it, when the plaintiff rested; after which, the plaintiff would have the right to introduce farther testimony, not only to rebut what the defendant had proved, but also to strengthen and support his cause of action, as first attempted to be proved; (The better rule is that as against mere negative defenses all affirmative evidence should be introduced together, and then be confined technically to evidence in reply. Ford vs. Niles, 1 Hill 402, Hustings vs. Palmer, 29 Wend. 225, and see generally Chap. 11, *infra*), and the defendant would not again be permitted to give further evidence upon that point. (*The rule supposes, however, that the case as first made by the plaintiff, shall be calculated to appraise the defendant of the ground on which the right of recovery is finally to be supported. Clayers & Morse vs. Ferris, 10 Vt. 112, substantially affirming the rule in N. Y.*). But in the present case, the defendant, after the plaintiff had made out a *prima facie* case and rested, did not attempt to disprove, or rebut, any fact which the plaintiff had proved, but introduced evidence, under his pleas in bar, to establish an independent, substantive fact, showing a discharge of the claim which the plaintiff had proved against him. Upon the issue thus raised the defendant was obliged to take and did take the affirmative; and we do not think that upon this he was bound to anticipate what answer the plaintiff could or would make to it —but might content himself, in the outset, by establishing such defence *prima facie*, with the same right to sustain it by rebutting evidence, in case it was at-

tacked by the plaintiff, as the plaintiff had as to the issue, when the affirmative ground belonged to him.

If, in this case, the plaintiff, instead of contradicting what was proved by the defendant, had set up new or substantive matter,—such as demand and refusal, he would again have had the affirmative of the issue, and the right again to rest upon a *prima facie* showing. In short, we think the right of opening or closing *the evidence* in a case does not belong either to the plaintiff or defendant, as such, but depends entirely upon which party takes the affirmative of the issue;—and the right to rest on a *prima facie* showing is mutual and belongs as well to a defendant as to a plaintiff."

To prove a certain fact may require strong or slight evidence according to the state of the law on such questions. Shaw, C. J., says, in Com. vs. Bradford, 9 Pick. 271, cited § 5 N. 1." If, for instance, a person should present himself as a voter and an inhabitant, and some evidence be given, that he had not been known or seen here till a recent period,—proof that he first came to a lodging within the city, within a few days or weeks previous to the election,—that he was not before known to those persons who would be likely to know all resident inhabitants—such as police officers, tax collectors, persons employed to collect names for a directory and the like,—and he should offer no proof on that subject, such proof being manifestly within his power, it would be strong evidence, in support of the negative to be proved, that he had not been a resident inhabitant.

Some maxims (*meaning presumptions*), to, on the subject of domicile, are to be taken into consideration, and probably were regarded, by the learned judge, as sufficient to change the *burden of proof*. These are, that a person can have but one domicile at one time—that he must have a domicile somewhere, and that one domicile continues till another is acquired."

But as shown in § 3, 5 & 10, *supra*, the burden as to opening and closing, so far as opening and closing the argument is concerned, it being derived from the pleadings, does not change. Sergent, J., in Judge, &c., vs. Stone, 44 N. H. 602, says: "In Bump vs. Smith, 11 N. H. 48, where the general issue was pleaded, with a brief statement of a justification, it was held that the general issue imposed upon the plaintiff the burden of making out his whole case before the matter in the brief statement comes in issue at all. The same is true where special pleas are pleaded with the general issue, and hence it has always been the practice for the plaintiff's counsel to open and close when the general issue is pleaded, whatever other matters may be pleaded specially or given notice of by brief statement, Toppan vs. Jenness, 21 N. H, 232, Ayer vs. Austin, 6 Pick. 225, Belknap vs. Wendell, 21 N. H. 175, where it is said by Gilchrist, C. J., that the point in issue is to be proved by the party who asserts the affirmative, and where the affirmative is upon a party, he has the right to open and close, and this is the case, though the burden of proof may shift in the course of the trial; that is,

is far from being always the case, as the allegation made by one party, whether in its nature affirmative or negative, and whether the subject-matter of discussion be a legal one or not, may be far the most probable of the two, as being more in accordance with our experience and knowledge of things, and their natural connection with each other: when this is the case, that proposition is said to have a presumption in its favour, and the contrary one a presumption against it; which state of things give rise to the second case of the general rule above mentioned; viz., where there are some antecedent grounds for believing the allegation of one party more probable than that of the other; or, where there is a *presumption*, as it is called, in favour of that allegation. Presumption is correctly defined by Mr. Starkie, (*c*) to be "an infer-

(c) 3 Stark. Ev. 1234

the party who has the first affirmative issue to prove—who has the burden of proof on him in the first instance, is to open and close. Russ vs. Gould, 5 Greenl. 204, is to the same effect.

Whenever the general issue is pleaded with a special plea of justification, or the like, then the burden of proof shifts in the course of the trial. The plaintiff must first prove his case, so as to entitle him to recover under the general issue. If he did not do this, the defendant would be entitled to a verdict on that issue, and he need not then trouble himself to prove his justification. But the *primary burden* being on the plaintiff, he first proves his case. When this is done, the verdict would be for him on that issue, unless the defendant proves his justification.

The burden of proof then shifts and the defendant has the burden of the second issue; still the plaintiff must open and close, because the *primary burden* of proof is on him, Brooks vs. Barrett, 7 Pick. 100, Comstock vs. Huldyme, 8 Conn. 261, in which Williams, J., says: "The plaintiff begins, and has the right of reply in all cases where the defendants pleadings or any part of them deny the whole or any part of the plaintiff's pleadings, so as to leave any affirmative allegation on his side to be established by proof." In Thurston vs. Kennet, 22 N. H. 152, the general issue was pleaded, and the plaintiff opened and closed. The same was true in Buzzell vs. Snell, 25 N. H. 478, though there the defendant on trial offered to make certain admissions, not made in his pleadings, for the purpose of gaining the right to open and close; but it was settled that this right must depend upon the form of the issue raised by the pleadings, and the genera issue, throwing the primary burden of proof upon the plaintiff he had also the close."

ence as to the existence of one fact, from the existence of some other fact, founded on a previous experience of their connection:" and again, by the Roman law, "præsumptio est anticipatio judicii, de rebus incertis, ex eo quod plerumque fit percepta; etenim anticipare est idem penitus quod præsumere (*d*).

§ 11. The effect of a presumption in favour of any proposition is to transfer the onus probandi to the party who asserts the contrary, (*a*) so that the party who asserts the negative has a pre-presumption in his favour, it does not affect the general rule further than to afford an additional reason for casting the onus probandi on him who asserts the affirmative. But where there is a presumption in favour of the affirmative allegation, then the onus probandi is cast on the adversary, even though he may thereby be called on to prove a negative. (*a*) Thus, if goods proved to have been stolen, are found shortly after in the possession of a particular individual, this raises a presumption that he was the thief (1) and in the event of his refusing or neglecting to show how he came by them, will fully warrant his conviction (*b*). And if a landlord give a receipt for rent due at a certain day, all

(*d*) Hub. Proel J. C. Lib. 22 Tit. 3. (*a*) 1 Phil. Ev. 187. (*b*) ib. 157.

1. In Ingalls vs. State S. C. of Wis. 1880, 9 Reporter 695 Taylor, J., says: "It is also urged by the learned counsel for the plaintiff in error, that the Circuit Judge in his instructions to the jury, gave too much importance to the evidence of the possession of the stolen goods, or some part of them, by the accused shortly after the larceny. The effect of such evidence was very ably discussed by the late Chief J. Dixon, in Graves vs. The State, 12 Wis. 591, and more recently by Justice Orton in The State vs. Snell, 46 Id. 524. The rule to be derived from these cases, and which is sustained by the late elementary writers upon evidence in criminal cases, is that the possession of the stolen goods by the accused recently after the larceny, does not raise any legal presumption of the guilt of the party so found in possession. The fact of the possession of the stolen goods by the accused is evidence *tending* to prove his guilt, but is in no sense conclusive of his guilt, nor does his guilt follow as a presumption of law unless such possession be explained by the accused. The courts of California have held that it was error to charge the jury that they should convict the accused upon the mere proof of the possession of the stolen property recently after the larceny. People vs. Ah. Ki. 20 Cal. 177, Peop. vs. Chambers, 18 nb. 382, Peop. vs. Levison, 16 Ib. 98."

former rent is presumed to be paid, because it is not *likely* (although perfectly possible) that he would not take in first the debts of longest standing (*c*).

Presumptions of this kind exist independent of human laws they are a natural process of reasoning adopted by the mind, in order to arrive at truth, in cases where positive and and direct evidence is not to be had ; and after laws have been established, these presumptions, as one of the means of investigating truth, still continue to be recognized and acted on. (1).

§ 12. But besides these natural presumptions, or *presumptions of fact* as they are called, there is another class, which are designated *legal* or *aitificial* ones ; *i. e.* "such as derive from the law any technical or artificial meaning beyond their mere natural tendency to produce belief," (*a*) and these are of two kinds, which we shall proceed to explain. By the law of England, questions of fact are to be determined and decided by a jury (2), and not by the judges, who cannot therefore, of themselves, make any *natural* presumption so as thereby to determine the rights of the litigant

(*c*) 1 Phil. Ev. 147. (*a*) 3 Stark. Ev. 1234.

1. Presumptions are allowed where the facts to be presumed are consistent with duty, trust, or power authorized, and tend to subserve the purpose of justice. But when the act would be unauthorized by the trust or office, or are contrary to the duty ot the party assuming the power, no such presumption can be admitted Rowan vs. Lamb. 4 Greene 468 ; so there is no presumption of exemption from common law inability—see Carriers.

2. It is the office of a jury to find facts upon *conflicting* evidence (Carnes vs. Platt, 1 Sweeny 146, Hagnes vs. Thomas 7 Ind. 38, Gilispie vs. Batter, 15 Ala. 276 Schwartzwelder vs. U. S. B'k 1 J. J. Marsh, 38, Tood vs. Whitney, 27 Me., 480 Reich vs. Reid 11 Tex. 585, Lindsay vs. Lindsay 11 Vt. 621, not from personal knowledge, but from the testimony of others who have personal knowledge of the facts, Clarke vs. Robinson, 5 B. Mon. 55, and from the facts, it is exclusively their province to draw all inferences and presumptions of fact as well as their application to the case in hand ; Allison vs. State, 42 Ind. 384 ; Salter vs. Myers, 5 B Mon. 280 ; Mnndine vs. Gold, 5 Port (Ala.) 215 ; so on the other hand the finding of a jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom the verdict is given, has attempted to infer from, or establish by the evidence (Hepburn vs. Dubois, 12 Pet. 375 ;) but this power is not a power of the will merely,—it is a power involving judgment and

discretion, and must be in a reasonable degree subject to those restraints which judgment and discretion imply, Duzenbury vs. Duzenbury, 14 B. Mon. 481.

The credibility of the witness is exclusively for the jury as well as the question whether the testimony of a witness is rendered suspicious by any of the facts proved Van Vieter vs. McKillup, 7 Blackf. 578; yet while the effect of the evidence is for the jury, they, in considering the weight of the evidence—the credit due to the respective witnesses, may not without reasonable or justifiable grounds disbelieve any witness. They have no right to discredit an unimpeached uncontradicted witness, who testifies fairly, and gives clear, rational consistent and relevant testimony, (Seibert vs. Erte R, R. Co., 49 Barb. 483) and this rule applies to the testimony of the parties to the cause equally to that of other persons, Burnett vs. Harris, 50 Barb. 379.

Again, it is true in many cases that when the facts of a case are undisputed, the effect of them is for the judgment of the court and not for the discretion of jury Carnes vs. Platt, 1 Sweeny 146; Gulick vs. Grover, 4 Vr. 473, this is true in that class of cases where the existence of such facts come in question, rather than were deductions or inferences are to be made frum them, and whether the facts be disputed or undisputed, if different minds may honestly draw different conclusion from them, the case is properly for the jury, R. R. Co. vs. Stout, 17 Wall. 657; Kansas Pacific R. R. Co. vs. Pointer, 14 Kan. 37; Thurbur vs. Harlem Bridge &c., R. R. Co., 60 N. Y. 326.

And in an action for malicious prosecution, the burden is upon the plaintiff to prove want of probable cause for the prosecution, and although the evidence be uncontradicted, yet, if the facts proved be capable of different inferences, it is for the jury to determine what, under the circumstances, would be the belief and action of men of ordinary prudence and a refusal to submit the case to the jury is error. Heyen vs. Blair, 62 N. Y. 18; Hector vs. Glasgow, 79 Pa. 79; Knickerbocker Ice Co. vs. Gould, 80 Ill. 388.

Whether there be fraud in fact is always for the jury, however plain a case it may be, by reason of the presence also, of fraud in law; Ehrishman vs. Roberts, 68 Pa. 309; Milm vs. Henry, 40 ib. 352, (distinguishing fraud in law from fraud in fact) and whether a contract is established by proof (3 Grant (Pa,) 241), as well as what the terms of the contract are; but the question as to what the legal effect of it is, is for the court and it is error to submit both of these questions to the jury. White vs. Murtlond, 71 Ill. 252.

The court will, however, see that there are proper bases of fact for inference and will not allow presumptions to be based upon presumptions, Pennington vs. Tell, 11 Ark. 212; Richmond vs. Aikin, 25 Vt. 324; Tanner vs. Hughes, 53 Pa. 289; McAleer vs. McMurry, 59 Id. 126; and the party on whom the burden rests is bound to prove each circumstance which is essential to the conclusion in the same manner as if the whole issue rested on it. Henderson vs. State, 14

Tex. 503; Brandon vs. Cabiness, 10 Ala. 155; Spaulding vs. Harvey, 7 Ind. 429.

The rule that affirmative testimony is entitled to more weight than negative has too many exceptions to be of much practical use, and many properly be withheld from an instruction (Glenn vs. Farmers B'k of N. C., 68 Ga. 191; Smith vs. McIlvaine, Id 287) except to overcome equipoise.

The jury may undoubtedly in all cases give a general verdict, thus taking upon themselves to judge of both the law and the fact, Mayor of Devizes vs. Clark, 3 Ad. & E 506—they may render a general or special verdict and the judge cannot compel them to do either, Peck vs. Snyder, 13 Mich. 21,, even after they have returned a special verdict, it is error to submit the cause again for a general verdict with instructions Spaulding vs. Mayhall, 27 Mo. 377; the rule obtains in criminal prosecutions, Com. vs. Cathams, 50 Pa, 181; Short vs. State, 7 Yerg. (Tenn.) 570—and if requested by either party the court must direct the jury if they render a general verdict, to find specially upon particular questions of fact, Mich R. R. Co. vs. Bivans. 13 Ind. 263; Bird vs. Lanius, 7 Ind. 615; Riffing vs. Felton, 12 Id. 259. The same rules apply to justices court in New Jersey. Springer vs. Reeves, 4 N. J. L, 207.

To constitute a special verdict certain facts should be found by the jury, with a conclusion that if the court should be of the opinion, upon the whole matter found, that the plaintiff is entitled to recover, then they find for the plaintiff, but if otherwise, then they find for the defendant. Mumford vs. Wardwell, 6 Wall. 423.

Each quesrion submitted to jury as a basis of a special verdict should relate only to one fact (Phœnix &c. Co. vs. Fletcher, 23 Cal. 418) and the finding should be full, and find all conclusion of fact so as to leave nothing for further determination except questions of law (2 N. Y. 406); and to justify a court in rendering a judgment upon a special finding of facts they must be inconsistent with the general verdict, and when taken together with the facts against a general verdict, such finding of facts together with those admitted in the pleadings must be sufficient to establish the right to recover. Lamb vs. First Presb. So., 20 Iowa; Harden vs. Branner, 25 Iowa, 364; Horn vs. Eberhatt, 17 Ind. 118; Lees vs. Clark. 20 Cal. 367.

In criminal cases the jury are the judges of the law and the facts, and are not bound by any charge that the judge may give, unless it truly states the law, of which the jury have the right to judge, McPherson vs. State, 22 Ga. 478; Holden vs. State, 5 Ga. 441; McGuffie vs. State, 17 Id. 497; McCullough vs. State, 10 Ind. 576; Forshee vs. Abrams, 2 Iowa 571; State vs. Saliba, 18 La. Ann. 35; People vs. Thayers, 1 Park Cr. 595; State vs Snow, 18 Me. 346; State vs. Jones, 5 Ala. 667; Armstrong vs. State, 4 Blackf. 247; Warren vs. State, Id. 159; and it is error to refuse to so instruct the jury when requested. Kane

*12 parties; (1) but whose *duty it is to explain to the jury the nature of any one which may present itself in the course of a

vs. Com. May, 1879. Pa.; State vs. Crotean, 28 Vt. 14; U. S. vs. Wilson, Baldw. 99.

2. Meaning simply presumptions of fact—"natural presumptions" which are inferences as to the existence of some fact drawn from the existence of some other fact:—inferences which common sense draws from circumstances usually occurring in such cases. The Court will not weigh evidence even by consent of parties. Prays vs. Burbank 11 N. H. 290, but it is error to submit a question to the jury upon which there is no conflict of testimony, Dickerson vs. Wason 48 Barb. 412.

These can only be made by a jury or by the court when acting as a jury. It is the duty of the court to state to the jury the legal presumption and inform them how far they must be governed by it, provided they find certain facts—hypothecally stated. But it is a clear invasion of the provice of the jury for the court to direct the jury when they shall make or apply a mere presumption of fact Allinson vs. State, 42 Ind. 354; R. R. Co vs. Stout, 17 Wall. 657; Garrolson vs. Pegg, 65 Ill. 195; Howard vs. Smith, 33 N. Y. Superior Ct. 124; McLean vs. Clark, 47 Ga. 24; and it is said in State vs. Harkin, 7 Nev. 377, "a judge has no more right to volunteer before the jury his opoinion upon a material fact in controversy while deciding a question of law on the trial, than he has to charge a jury in respect to such fact. If he expresses an opinion it is a wrong requiring redress as imperatively in a case of mere inadvertence as in a case of wilful evasion of law," Cilleman vs. Ball, 49 Mo. 249; Johnson vs. Johnson, 71 N. C. 402; Roper vs. Stone, Cooke (Tenn.) 499; Gorden vs. Tuber, 5 Vt. 103; Burt vs. Gevinn, 4 Har. & J. 507. It is equally illegal for the court to single out certain testimony—and tell the jury that it is entitled to great or little weight, State Hundly, 46 Mo. 414; Jenkins vs. Tobin, 31 Ark. 306; Frame vs. Badger, 76 Ill. 441; Evans vs. George, 80 Ill. 51; Ketchem vs. Ebert, 33 Wis. 611; McCircle vs. Simpson, 42 Ind. 453; but they should employ apt means to inform the jury what facts in the case are in law evidential and distinguish them from such as are not, City B'k of Macon vs. Kent, 57 Ga. 283; Smith & Bennet vs. State, 12 Vr. 371; without intimating their mental convictions in respect to the existence, non-existence, or application of such facts, and they should not carry on a process of general reasoning as to the evidence. Hays vs. State, 58 Ga. 36; State vs. Dancy, 78 N. C. 437.

But singularly enough the inherited English doctrine, "He may, if he thinks necessary, tell the jury the impression the evidence has left upon his mind," Chit. Arch Pr. Q. B. 384; Davidson vs. Stanley, 3 Sc. N. S., still obtains, and ever and anon reaffirmed, Rodings Exr. vs. Royal, Pa. Feb. 10 1879, 8 Reptr. 27; (see

trial, (1) and informing the jury of its recoginition by the law, as a ground on which decisions may legitimately become to, di-

caveat of Dalrimple, J., lest the old doctrine should be impinged, Smith and Bennett vs. State, 12 Vr. 385,) in some of the older States. In Balkely vs. Ketellas, 4 Sand, N. Y., 459, the doctrine of these courts is well expressed. "It is the undoubted right of the judge to comment upon the evidence, and the exercise of it is not the subject of exceptions; but, if the court see that the charge of the judge upon the evidence has caused injustice it may interfere, as it would with a verdict of a jury against evidence. How can the appellate court see that the comment on the evidence caused injustice? Perhaps the jury entirely ignored the disquisition of the judge upon the facts They certainly have the right to; and they may or may not adopt the theorizing of the parties or their counsels. Then the opinion of the judge to legally effect the verdict, must be regarded in the light of testimony, as if an expert learned in ratiocination had testified, that the testimony of A, B and C amounted to proof of agency, partnership, adverse possession, intent, &c.,—an absurdity so transparent that a verdict would be deemed affected by it in law whether it was in fact or not, and can a court know any more about a verdict than to see that no illegal elements entered into it?

The following propositions of the courts of each of these schools will show the contrast. "It cannot often be proper for a judge to tell the jury that they are not at liberty to believe the witness," Conrad vs. Williams, 6 Hill 444; "where the evidence is conflicting and very evenly balanced, an instruction that the remembrance of occurrences nearly a year back" is not always to be expected of a witness," held to be error as bolstering his testimony," Shaw vs. People, 81 Ill. 151. In opinions, impressions, &c., there is sometimes an element of Humaue nature. and when they "militate against an obnoxious party, the judge declares that he is bound to administer the law as he finds it;—that it is not for him to overturn the decisions of his predecessors, or set in judgment upon the wisdom of the legislature;—and to blame him for this is impossible. But when the party against whom the rule presses is a favored one—the judge discovers that laws were made for the *benefit* of men, not their *ruin*—that technical objections argue an unworthy cause; and that the first dpty of every tribunal is to administer substantial justice at any price. And by thus shifting the urn from which the principle of his decision is taken, the judge sits like the fabled Jove, the absolute arbiter of almost every case that comes before him.

"Two urns by Jove's high throne have ever stood,
The souree of evil one, and one of good;
From thence the cup of mortal man he fills,
Blessings to these, to those distribute ills."

Best Ev. 103.

1. Questions of competency and relevancy or pertenency are among the live questions with which the court have to deal. The pleadings must be examined,

and the testimony will be limited to the *point* in controversy, Clark vs. Vorce 19 Wend. 232, Scholey vs. Mumford 64 N. Y. 521, Hayes vs. Ball 72 Id. 418, the court will not generally hear evcidence of admitted facts, Ridgway vs. Longaker 18 Pa. 215, nor can admissions in the pleadings be contradicted on the trial Robbins vs. Codman 4 E. D Sme. 315;—so if a fact in a party's favor be clearly implied by law (presumption) no evidence should be allowed to prove it Dearmond vs. Dearmond 12 Ind. 455; and where distinct propositions must be established;—it is not error to permit the party to present his evidence to support them in whatever order he may elect Cook vs. Robinson 42 Iowa 474.

Where evidence is offered of a fact which must have been preceeded by another fact, without which it is unavailing to a party, it is only admitted on the assurance that such other proof will be made, Lombard vs Chiever 8 Ill. 469, and it will not then be received, out of its natural order and sequence if equal assurance come from the other side that such antecedent facts do not exist, Davis vy. Calvert 5 Gill & J. 269.

The testimony must always be admissible at the very time of its offer, Hervey vs. Kerr 8 Bos. 194, and the court at the request of the other side will in case of any doubt of the legality of the testimony about to be offered require counsel to state the substance of the evidence expected to be given by a witness, or so much as discloses a clear tendency to prove his point, Defiance vs Hazen 1 Chand, (Wis.) 125, and if counsel declines, exclude the witness Roy vs. Targee 7 Wend, 359; and if it be found legally insufficient for the purpose for which it is offered it will be rejected, Baltimore &c., Co., vs. Dobbins, 23 Md, 210, McTavish vs. Carroll 13 Id. 429, Green vs. Caulk 16 Id. 566, O'brien vs. Hilburn 22 Tex. 616. But when the party is not required by the other side to state the purpose for which he offers the evidence, it is admissable if competent for any purpose, King vs. Faber 51 Pa. 387; and the party offering evidence is understood to wave any objections to its competency as proof, Greenlief vs. Birth 5 Pet. 132 Wheeler vs. Hill, 16 Mis. 329,—and a contrary finding will be reversed, Fordham vs. Smith, 46 N. Y. 683. A presumption of injury to authorize a reversal obtains whenever illegal evidence be admitted over objections which are specific, whether it be incompetent, Hawley vs. Hatter. 9 Hun. 134, Brague vs. Lord 67 N. Y. 495,—or irrelvant, Havemyer vs. Havemyer 11 J. & Spr. 506; so there is a presumption in favor of the competency and credibility of a witness, and the burden of making out incompetency and incredibility is with the party objecting Marshden vs. Standfield 7 B. & Cress, 815, Watts vs. Garrett, 3 Gill & J. 355, Johnson vs. Kendall, 20 N. H. 304, Duel vs. Fssher 4 Denio 515, and on principle the objector should have the open and reply. But a different rule obtains as to relevency. The party offering testimony has the burden of showing its tendency to prove the allegations put in issue. The burden of proof includes the burden of showing the probative tendency of the facts offered to support an

affirmative, Weidlar vs. The Farm B'k, of Lans, 11 Serg & R. 134.—140, Harwood vs. Ramsey, 15 Id. 31, Vanburen vs. Wells, 19 Wend, 204, The town Man. Co. vs. Foster, 51 Barb 351, Jackson vs. Smith, 7 Cow 717. In the Phil. & Trent. R. R. Co. vs. Shipson, 14 Pet. 460, Story J. says "It is incumbent upon those who insist upon the right to put particular questions to a witness, to establish that right beyond a reasonable doubt, *for the very purpose stated by them;* and they are not afterwards at liberty to desert that purpose, and to show the pertenancy or relevancy of the evidence for any other purpose, not then suggested to the court." In the discussion of the relevancy of an offer of testimony, the court will first decide whether it be prima facie relevant Wicks vs Smith, 18 Kans. 508, Innormarity vs. Bryne, 8 Port. (Ala) 176 U. S. vs. Gilbert, 2 Sumn. 19, Vanburen, vs. Wells *supra* and indicate whom they will hear upon,—the proposer or objector: but it is submitted that upon principle the proposer should have the reply before objections to his testimony be sustained, as the primary, and ultimate burden is on him of showing the relation of the proof to the allegation, Crenshrw vs. Davenport, 6 Ala. 390, Tuzzle vs. Barkley, Id, 406, Blackburn vs. Beal, 21 Md. 208, State vs. Belausky. 3 Minn. 246, Fuller vs. Clark, 3 E. D. Sum. 302.

The grounds of objection to an offer of testimon, if required, must be stated and the party objecting will be held to such ground, Williken vs. Barr, 7 Pa 23, Gilbert vs. Kennedy, 22 Mich. 117,—the objection is to be determined independent of the answer to it, Broner vs. Forauentheal, 37 N. Y. 166, 9 Bos. 350 and the court will not separate legal from illegal evidence on a general objection, but may without error exclude the whole. Tooley vs. Bacon, 70 N. Y. 34.

But it is now held that improper evidence must be excluded in criminal cases whether objected to or not, State vs. O'Conner, 65 Mo. 374, and the language of the court in State vs. Sooy, 12 Vr. 401 is, "The examiner was bound to so frame his interrogations as to exclude the probability of irrelevant testimony."

It sometimes requires consumate skill and patience to discover the precise boundary between relevant and irrelevant testimony. An exact knowledge of the legal import of the allegations to be proved and the quantity and quality of testimony required by the law to support them is the first prerequisite, and this will involve a knowledge of the least, i. e., the smallest compass of facts which will support the allegation or allegations to be made out. This measure of testimony is the foundation principle of the investigation. This forms, or must be assumed to form, an axionialic basis by law. Every sufficient remediable allegation requires a definite measure of fact to support it in law, and any measure below the *minimum*, will be deamed a total failure of proof. Johnson vs. Moss, 45 Cal. 515; O'Brien vs. St. Paul, 18 Minn. 176, Packard vs. Snell, 35 Iowa, 80; Walter vs. Bennett, 16 N. Y. 250, Ross vs. Mather, 50 N. Y. 1. Relevancy is conversant alone with the legal relation of an offer of particular testimony to the

rect or advise them to find accordingly (4). Now, sometimes the law gives to a mere natural presumption an artificial degree of weight which it would not otherwise have had, but still leaves to the jury to make the presumption to the extent recognized; while at others it goes a step further, and on the very aspect of the pleadings raises a presumption without the intervention of a

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allegation to be proved or negatived. When an offer is made, it must be assumed to be made pursuant to a *theory* of the proof of the case or defence. But what is a theory? A supposition which reconciles all the facts necessary in law to support the case or defence in hand. Assuming the theory to comprehend sufficient facts, we can approach the ultimate question as a test; does the fact offered bear any necessary relation *in law* to the theory of the offer?

There is this necessary relation when the fact offered,
- (1) is part or shows the absence of part of,
- (2) is a cause of or shows the absence of a cause of,
- (3) is an effect or shows the absence of an effect of,
- (4) an effect of a cause or shows an absence of an effect of a cause of,
- (5) is a legal accompaniment or shows an absence of such accompaniment of,

the facts of the theory,

4. The usual course in the older States and in England is, for the judge, after the cause has been summed up upon on both sides by counsel, to proceed to charge the jury; explaining to them the nature of the action and of the defence, and the points in issue between the parties; recapitulating the evidence which has been produced on both sides, remarking upon it when necessary, and directing the jury on all points of law arising on the evidence. 1 Bur. Pr. 235. This method of declaring the law after argument of counsel is attended with almost an insuperable embarrassment in cases where the judge's views of the law are sought to be reviewed. A general exception to the oral charge does not bring up any particular remark of the judge, or any omission in the charge, Magovering vs. Staples, 7 Lans. 145, Cam. & Amb. R. R. vs. Belknap 21 Wend. 354, Hunt vs. Maybee, 7 N. Y. 256. This necessitates an interruption of the judge during the charge or a request after the charge,—that the charge be changed in a specific particular or that other elements of the case should be charged upon, &c., not unfrequently provoking a discussion of law, signing exceptions, &c.,—producing disorder and confusion in the proceedings,—depriving counsel of the benefit of the settled law before their argument. If, during the progress of the trial, the court and counsel have not come to a complete agreement as to the law of the case in all its phases it is almost a necessity to fairness, propriety and or-

der, that counsel on either side prepare in writing clearly expressed instructions upon specified points, and submit them before the argument, after the testimony is all in, to the court for affirmance or rejection. Instructions given in a civil case are not permitted to be controverted in the argument; and the remedy is on exceptions to the instructions. Delaplane vs. Crenshaw, 15 Gratt. 457. The court will settle the law of a case, on application of counsel, before it is argued, Barney vs. Demils Wright (O.) 44, Zabriskie vs. Smith, 13 N. Y. 338,—in open court, O'Connor vs. Guthrie, 11 Iowa 80,—in the hearing of opposing counsel, Tinkham vs. Thomas, 2 J. & Spr. 238, and if objected to exceptions must be taken at the time they are given, Rowlens vs. Tucker, 3 Iowa 213, Gower vs. Dill, Id. 338, Callon vs. Walkins, 6 Wis. 629, Kennedy vs. Cunningham, 2 Mete (Ky.) 538, Gorden vs. Gorden, 13 Mo. 215, Borah vs. Martin, 2 Chand. (Wis.) 56,—before the judge has charged the jury, Smith vs. Keen, 26 Me,—and before the jury retire, Montgomery vs. Gilmer, 33 Ala. 117, or it will be at the discretion of the court whether they will call back the jury for instructions. St. Johns vs. Kidd, 26 Cal. 263, Tinkham vs. Thomas, *supra*.

Objections,—the foundation for exceptions to instructions relate first to a refusal to give a correct charge upon a point raised by the pleading and distinctly supported by the evidence, Comstock vs. Dodge, 43 How. Pr. 99, and second, the giving an erroneous charge. First, if the instruction be correct, it should be given substantially as requested. Fay vs. O'Neil, 36 N. Y. 11, Bell vs. Troy, 35 Ala. 181, Bland vs. People, 4 Ill. 264, Davis vs. Perley, 30 Cal. 630, Tober vs Hutson, 5 Ind. 322, Denkers vs. Temple, 41 Pa. 234, Sy. Ins. Co. vs. Schriffler, 42 Id. 188,—the court must see that it be fully and fairly addressed to the jury, and is error to say, "such is the law," in responding to such request, Davis vs. State, 14 Ga. 101, Hays vs. Paul, 51 Pa. 134, State vs. Wilson, 3 Ill. 225, Penn. R. R. Co. vs. Zebe, 33 Pa. 318,—on the exact law, not on its history, object, or purpose, Lincoln vs. Wright, 23 Pa. 76, or other remarks calculated to mislead the jury, Biehler vs. Coonce, 9 Mo. 347, Powers vs. M. C. Ferron, 2 Serg. & R. 44, Smith vs. Thompson. Id. 48, but have the law correctly stated on the facts as he claims them to have been proved, where testimony has been given tending to sustain his view of the case, if it be legally sufficient to allow the case to go to the jury, Whitney vs. Synde, 16 Vt. 679, Gilkey vs. Peeler, 22 Tex. 663, Ridens vs. Ridens, 29 Mo. 470, Smith vs. Johnson, 13 Ind. 224, Hopkins vs. Richardson, 9 Gratt. 485, Anderson vs. Bath, 42 Me., and the party being bound by the instructions he asks, i. e., the theory of the case he presents, Clift vs. Stockton, 4 Litt. (Ky) 414, Alston vs. Grantham, 26 Ga. 374, Fry vs. Hinkley, 18 Me. 320, Flowers vs Helm, 29 Mo. 324, and this completely assumed the correctness of the pleadings. Guy vs. Tams, 6 Gill. 82.

The court is not bound to charge on particular points unless requested at the trial, Rozar vs. Burns, 13 Ga. 34, Hatch vs. Spravin, 11 Me. 354, Hall vs. Weir,

1 Allen 261, Moore vs. Ross, 11 N. H. 547, Burntide vs. Grand, T. R. R. Co., 47 Id. 554. Davis vs. Elliott, 15 Gray 90, Parsons vs. Brown, 15 Barb. 590,—a neglect of the court to respond when so requested is a refusal, Bartle vs. Saunders, 2 Grant Pa 199, Shaeffer vs. Landis, 1 Serg. & R. 449, and the request must be preferred before argument or the privilege is waived. Fennan vs. Blood, 2 Kans. 496. Vaughn vs. Porter, 16 Vt. 266, Cady vs. Owen, 33 Vt. 598, Harrison vs. Young, 9 Ga. 359.

Second—the giving of erroneous charges. There should be no instruction upon a point upon which there is no evidence, Miles vs. Douglass, 34 Conn. 393, Hill vs. Candfield, 56 Pa. 454, Phil. & C. R. R. Co. vs. Harper, 29 Md. 330, Harvey vs. Skepworth, 6 Gratt. 393. Hite vs. Blanford, 45 Ill. 9, but they should be affirmatively authorized by the evidence, Doonan vs. Mitchell, 26 Ga. 472, State vs Ross, 29 Mo. 32, Eli vs. Tallman, 14 Wis. 23, Sterns vs. James, 14 Allen 582, Hope vs. Lawrence, 50 Barb. 258,—and however true as an abstract principle,—if it have no application to the case it must be refused, 44 N. H. 452, Hufman vs. Ackley, 34 Mo. 217, Oliver vs. Depew, 14 Iowa 490, Dwier vs. Dunbar, 5 Wall. 318, Allen vs. Wannamaker, 31 N. J. L. 370, Laber vs. Cooper, 7 Wall. 565, Camp vs. Helan, 43 Mo. 591, Diversy vs. Kellogg, 44 Ill. 114, Bower vs. Earl, 18 Mich. 367,—and if the instruction be in such form that the court may not charge in its very terms without qualifications, it is said the court is not bound to separate a proposition of this kind and pick out which is good and refuse the rest. Bevan vs. Haydon, 13 Iow. 122, Keller vs. N. Y. Cent. R. R., 24 How. Pr. 172, Tifield vs. Adams, 32 Iowa 487, Bagley vs. Smith, 10 N. Y. 489,—as if two propositions be submitted, one of which is erroneous, it will be by some courts wholly rejected. Preston vs. Leighton, 6 Md., Birney vs. N. Y. & C. Co., 18 Md. 341, Smith vs. Richmond, 18 Cal. 496.

Instruction must not assume the existence of facts upon which it is based, Robinson vs. Chaplin, 6 Iowa 91, Adams vs. Thurman, 5 Dana 393, Peterson vs. Elliott, 9 Md. 52. Shelton vs. Hamilton, 23 Miss. 496, Rushin vs. Shields, 11 Ga. 636, Conway vs. Shelton, 3 Ind. 344.

Instructions which assume to pass upon the weight of evidence are erroneous, Nanper vs. Young, 12 Iowa 450; Boyd vs. McIver, 11 Ala. 822; Buffington vs. Cook, 35 Ala. 312; Buttersby vs. Abbott, 9 Cal. 565; Stacy vs. Cobb. 36 Ills. 349; Schemer vs. Lamp, 17 Mo. 142; Clap vs. Braneagham, 9 Cow 530; Kimbro vs. Hamilton, 28 Tex. 560; Marriner vs. Pettebone, 14 Wis. 195. The weight and probative effect is exclusively for the jury, Zerger vs. Sailer, 6 Binn, 24; Brown vs. Campbell, 1 Serg. & R. 176; Holems vs. Watson, 28 Pa. 457, Billis, vs. Phillips, 4 Dutch, 125; Choteau vs. Steamboat Co., St Anthony 12 Mo. 489; but the court must tell the jury what will be the legal effect of the establishment of a disreputed fact. State vs. Anderson, 4 Nev. 265; Clark vs. Tuber, 28 Vt. 222; the effect of written evidence Brunett vs. Hallis, 9 Tex.

437, and unless testimony be objected to at the trial, the court may properly refuse to exclude it from the jury by an instruction at the close of the case, Drebman vs. Stifel, 41 Mo. 184; Cook vs. Brown, 39 Me. 443; Davis vs. Strolen, 17 Iowa 521.

Special charges to a jury, which are included in a general charge previously given, should be refused Gentry vs. Berges, 8 Blackf. 261; Thompson vs. Grimes 5 Ind. 385; Nelson vs. Hardy, 7 Ind. 364; Jones vs. Prescoe, 24 Mo. 498; Price vs. Alexander, 2 Greene 427; Mills vs. Mahon, 9 Iowa 448; Moye vs. Herndon, 30 Miss. 110; Lyuch vs. Welsh, 3 Pa. 294; Groft vs. Weakland, 34 Id. 304; Arbuckle vs. Thompson, 37 Id. 170; Duffel vs Noble, 14 Tex. 610, and where a charge to a jury is legal in itself, it will not be ground for reversing the judgment that it was not sufficiently full, or was calculated to mislead the jury; but additional or explanatory charges should be asked for, Casky vs. Haveland, 13 Ala. 315; Dave vs. State, 22 Id. 23; Warner vs. Dunavan, 23 Ill. 380; Kent vs. Tyson, 20 N. H. 121; Stroud vs. Erith, 11 Barb. 300; Hayward vs. Ornsby, 11 Wis. 3.—want of directness in a judge's charge must be met by a special request for specific instructions by the dissatisfied party, McCausland vs. Cresap, 3 Iowa 161; Castle vs. Bullard, 23 How 172; Keuan vs. Holloway, 16 Ala. 53; Bast vs. Alferd, 20 Tex. 226; Brunell vs. Rumyon, 4 Dana. 422, and if one party procures an erroneous instruction to be given, and, at the instance of the opposite party, another is given qualifyiug the former, the instructions should be considered together; and if when so considered the law is correctly laid down, the error in the first is cured. Vanbuskirk vs. Day, 32 Ill. 260, contra; Denman vs. Bloomer, 11 Ill. 177; Sones vs. Talbot, 4 Mo. 219.

Instructions should generally present the actual controversy without referring the jury to the pleadings, Dassler vs. Wilsey, 32 Mo., 498,—whether there be an issue at all or not Bradshaw vs. Mayfield, 24 Tex, 494; Burgess vs. Lloyd, 7 Md., 177,—all admitted and uncontroverted facts, Hedgpith vs. Robinson, 18 Tex. 858; when the testimony does not tend to make to make out a case, Graff vs. Potts &c., R. R. Co. 31, Pa. 489, and when there is no testimony to sustain the issue Hynds vs. Hays, 25 Ind. 31; Lade vs. Old, Col. R. R. Co., 14 Gray 143; Grand Trunk R. R. Co., vs. Nichols, 18 Mich. 170. They should separate the law and the fact Rogers vs. Broadux, 24 Tex. 538; and not leave a question of law to the jury; Gober vs. Hageman, 26 Ill. 438; Butler vs. Thompson, 11 B. Mon. 237; Hickey vs. Ryan, 15 Mo. 62; Work vs. McClay, 2 Serg. & R. 416,—nor declare a presumption of fact to be one of law; Newton vs. Jackson, 23 Ala. 335; they must state legal presumption—not inferences of fact; Winrich vs. Heffner, 38 Pa. 297; White vs. Hass, 32 Ala. 430; and they must not take from the jury any inferences of fact; Burles vs. State, 4 Md. 273; Abell vs. Harris, 11 Gill & J. 367; Pettengill vs. Porter, 8 Allen 1; Trendell vs. Wells, 4 Cal. 260; Fredericks vs. Gaston, 1 Greene, (Iowa) 401, but the court will instruct as to a presumption of law on a

jury at all. These latter are called *presumptions of law*; the former, *presumptions of mixed law and fact.* (5)

5. Presumptions not established by law and left to the jury must be weighty, precise and consistent. The known fact on which the presumption reposes must draw with it the unknown fact as almost necessary consequence. The presumption must be precise—not susceptable of application to other circumstances than those sought to be established; Beach vs. Cohn, 3 La. Ann 103; Hamilton vs. People, 29 Mich. 193; and the party upon whom the burden rests is bound to prove each circumstance which is essential to the conclusion, in the same manner as if the whole issue rested on it; Henderson vs. State, 14 Tex. 503; Braden vs. Carbiness, 10 Ala. 155; Spaulding vs. Harvey, 7 Ind. 429; State vs. Patterson, 45 Vt. 308.

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material point in the absence of proof although the opposite party has already overthrown the presumption by proof; Potter vs. Chadsey, 16 Abb. Pr. 146; and yet when there is no opposing evidence it is the duty of the court to direct the jury for whom a verdict shall be found, Haynes vs. Thomas, 7 Ind. 38; Todd vs. Whitney, 27 Me. 480; Bond vs. Mallow, 17 Tex. 636; Lindsay vs. Lindsay, 11 Vt. 621.

In case of equal division of the bench it is their duty to charge upon the point one way or the other,—or suspend the trial till another time for such cause; Boardman vs. Keeler, 1 Aik. Vt. 158, and not submit the question of law to the jury; Hall vs. Adams, Id. 166.

The form of instructions should be hypothetical as to the facts, *i. e. that if the jury find from the testimony that, &c., (reciting the substantive facts,)* and be direct and positive as to the law, *i. e. that in the event of finding so and so* they find for the plaintiff or defendant, as the case may be. In LeRoy vs. The Park Fire Ins. Co. 39 N. Y 57; Hunt, C. J., says: "The defendants asked the court to charge, that, as there was no water in the flumes or trunk at the time of the fire, and had not been for five months, so that none could be thrown over the building on the wheels, the conditions of the survey and the policy in respect to that fact were violated by the plaintiffs, and they should not recover. If the defendants had requested the law to be thus charged.—*if the jury should be of the opinion that the survey had been delivered by the plaintiffs as a valid instrument,—and if they should find the fact in respect to the absence of water, to be as claimed by the defendants,* a fair question would have been presented." There are two criticisms on this charge, which may be important to notice 1st, "*if the jury should be of the opinion.*" The language should be if the jury find from the testimony that the survey (assuming that there was no controversy about this paper) had been delivered by the plaintiffs to be acted upon, &c., as a valid instrument; 2d, "*to be as claimed by the defendants.*" The substantive facts

§ 13. Now, as the present treatise is principally designed to illustrate the practice relative to the respective rights of the contending parties to begin to give evidence to the jury, which is only affected, as shall be shown in the next chapter, by the onus probandi as it appears on the record, (1) and is therefore a matter entirely for the decision of the judges; it follows that, any further consideration here of presumptions of *fact*, whether simple or mixed, would be altogether misplaced, as they cannot be made without the intervention of a jury, and consequently do not affect the right to begin. We will therefore, confine our-

1. The parties will be bound by the case as they have made it by the pleadings, Rawlins vs. Danvirs, 5 Esp. 38; and the court has to decide upon the burden and relevancy of testimony. In Seymour vs. Hubert, Pa., May 3. 1880, 10 Rept'r 182; Mercur J. said "It may be conceded as a general rule, that in case of a *scire facias* to revive a judgment, no defence can be made, except matters arising subsequent to the judgment. The merits of the original judgment cannot be inquired into so as to admit of a defence which might have been set up in the original suit. Cardosa vs Hernies, 5 S. & R. 65; Davidson vs. Thornton, 7 Barr. 128; Ry. co. vs. Marshall, 4 Norris 187. If the objection be to the validity of the former judgment, the proper mode is to apply to have it opened. The original judgment in this case was entered as a judgment note. It is claimed that when this note was executed, both the makers thereof were married women, and the judgment thereon void. Instead of an application to open the original judgment, the coverture of each of the makers was severally pleaded and denied in the replication. The defendant in error did not demur to the plea, nor move to strike it off,—but accepted the issue tendered. The question of coverture was thus made one of the issues to be tried. It is substantially the same as if it had been framed in the original judgment. The defendant in error thereby waived her right to exclude the evidence of coverture. Under the pleadings it was admissable and if found to exist at the execution of the note, that issue should have been found in favor of the plaintiff's in error," Thompson vs. Barkley, 3 Cas. 263.

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as claimed by the defendant should have been inserted instead of the indefiniteness of "*as claimed by the defendant.*" This is an artistic job in many cases, and will tax the brain of counsel frequently. To set them out in the language of the pleadings under the code will usually suffice,—but under common law averments,—which are more or less general, it seems necessary to descend to greater particularity,—say to substantive facts.

selves to presumptions of *law*, and commence by observing, that these are subject to a twofold subdivision. Some are made by law, with such a degree of strictness, that it will admit of no proof or evidence to the contrary (2); and which, for this reason, partake, to a certain extent, of the nature of fixed rules of law,

2. Dr. Wharton in his Ev. § 1234. says "The assignment of irrebuttability to presumptions, however, is as repugnant to the practical jurisprudence of business life, as it is to the philosophical jurisprudence of Rome. Practical jurisprudence soon discovers that a presumption that is irrebuttable in the age of ignorance is rebuttable in an age of civilization, Mills Log. 1, 389. That a man cannot be, in the same week, in Rome and in London, was an irrebuttable presumption in the twelfth century; it is no presumption at all in the nineteenth. That information cannot be passed instantaneously from one business center to another, was in the twelfth century, irrebuttably presumed; in the nineteenth century most of our business contracts are affected by information so received, Bests Ev. § 307. The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of *presumptiones juris* et *de jure*, that while the class is still said to exist, no perfect individuals of the class can be found. The unimpeachability of records is one of the last survivors of these presumptions, and the unimpeachability of records is still spoken of as a presumption *juris et de jure;* but whatever may be the name given to this presumption, it vanishes where it is confronted by proof of fraud or oppression." *ex parte* Lange 18 Wall 163. 9 Id. 350. All allegations of fact are open to jury inquiry, unless they are concluded by the law of estoppels or actual waver; as that a right of way precludes the idea that the party who has the right cannot repair or keep the way in order, McMillan vs. Cronin, 75 N. Y. 477,—that the failure to object to testimony for the purpose for which it is offered precludes the party from subsequently resisting its use for that purpose, Miles vs. Loomis, 75 N. Y. 389, and if objections be made, all reasons for excluding the testimony will be deemed waived except those pointed out in the objection, Williken vs. Barr, 7 Pa., 23, Gilbert vs. Kennedy, 22 Mich. 117,—that the statute of limitations runs from the date of a note payable on demand, De Levellette vs. Wendt, 74 N. Y. 579,—and that if a creditor have two demands against his debtor, he may elect to which of two demands he will apply a payment which is not specifically appropriated by the debtor, though one be secured and the other not, Harding vs. Tifft, 75 N. Y. 461. So a proposition assumed or decided by the court to be true, and which must be assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided, School Trustees vs. Stocker 13 Vr. 117.

(*a*). Thus it is presumed, that an infant under the age of fourteen, cannot be guilty, as principal in the first degree, to a rape *14 (3) (*b*), or under seven, be guilty of *any* felony* whatever (*c*) that if parties conspire to depose and imprison the king, they have thereby contemplated his death (*d*), that every subject is acquainted with the common and general statue law, so as to make him amenable for their violation (4) (*e*); that a deed or bond was made on good consideration (*f*); that if a party gives a receipt (5) under his hand and seal that he has received the money (*g*). These are called irrebuttable presumptions of law, *presumptiones juris et de jure*, a term borrowed from the civilians (*h*); and as they are not very numerous, and shut out all evidence on the subject-matter of the issue, we need say no more about them.

(*a*) 3 Stark. Ev. tit. Presump.; 2 Ev. Poth. 334.
(*b*) 1 H. P. C. 630; Rex vs. Groombridge, 7 C. & P. 582.
(*c*) 1 H. P. C. 27.
(*d*) Id. 109.
(*e*) 1 Phil. Ev. 363.
(*f*) 3 Stark. Ev. 1241.
(*g*) 1 Phil. Ev. 147.
(*h*) Huh. Prœl. J. C. lib. 22 tit. 3.

3. This presumption it seems may now be overcome by clear proof of maturity Peop. vs. Rudolph, 2 Park Cr. 164, contra Com. vs. Green, 2 Pick, 380; wherein it is held that there may be a conviction of an assault with intent to commit a rape. But the carnal knowledge of a child under ten is rape, because force and want of consent is conclusively presumed, Peop. vs. McDonald, 9 Mich. 150.

4. The presumption that all persons know the law must be confined to presuming that all persons know the law exists,—but not that they are presumed to know how the courts will construe it, and whether, if it be a statute, it will or will not be held to be constitutional, Brent vs. State, 43 Ala. 297.

But the law imputes absolute knowledge of the laws and rules under which parties are claiming and acting.—as members of a stock exchange, Stewart vs. Canty, 8 M. & W. 160; Mitchell vs. Newell, 15 Id. 389; — members of a club, Raggett, vs. Musgrave, 2 C. & P. 556,—that a lessee knew the title he accepted, Butler vs. Potarhington, 1 Con. & L. 24,—and that parties executing instruments know what they mean, Lewis vs. R. R. 5 H. & N. 576, Androscoggin B'k 10 Cush. 373, Clem. vs. R. R. 9 Ind. 488.

5. Seal is not now in the way of proving mistake, fraud or no consideration, Jones vs. Ward, 10 Yerk, 160; but otherwise, if a receipt constitutes a part of a contract as well as an acknowledgment of a sum of money as "Received Brookfield, July 11, 1849, of Wm. D. Knapp, $40 in fall for damages done to us by stage accident of the 13th of June last," Coon vs. Knapp, 4 Seld. 402; Egleston vs. Knickerbocker, 6 Barb. 458.

§ 14. The only class of presumtions, therefore, which remain, are those where the law, without the intervention of a jury, presumes one of the allegations on which the issue is joined to be true or false, until evidence is given to prove the contrary. Such are called *presumptiones juris*, or rebuttable presumtions of law; and as they are pretty numerous, we shall content ourselves with noticing some of the most important.

First, then, it is a general principle, which runs through the whole law of England, that "Odiosa et inhonesta non sunt in lege præsumenda," (1) (*a*); and again. "Injuria (2) non-præsumitur," (*b*);

(*a*) 10 Co. 56 a.; 3 Stark. Ev. 1248. (*b*) Co. Litt. 232.

1. A desire of self preservation as against suicide will be presumed, Cont. Ins. Co. 2 Weekly N. 277, Weiss vs. R. R. 1b. 214; Whitford vs. Southbridge, 119 Mass. 564, so all contracts will be deemed to be lawful, Feldeman vs. Gamble, 20 N. J. Eq. 494; and in an action to recover the value of work and labor performed by the plaintiff for the defendant, it being in evidence on cross-examination that defendant's business, in which the plaintiff was employed, was the selling of rum, brandy &c., by the glass, and the defendant without introducing any witnesses in defence, contended, that the services rendered by the plaintiff, upon his own showing, were in the illegal sale of spirituous liquors, and that, in the absence of any testimony to this point. the presumption of law was that the plaintiff was not licensed so to sell. The court ruled that, "there is no presumption in favor of the defendant, that he had been violating the law, by selling liquors without license, and that if he relied on the illegality of the contract, he should have given some evidence of the fact that rendered it so," Turnson vs. Moulton. &c., 3 Cush. 269. See Smith vs. Joice, 12 Barb. 21; 24 Wend. 15; 1 Den. 175.

A Declaration on a Policy of Life Assurance alleged the contract between the deceased and the defendants to have been based on a declaration or statement in writing by the deceased, in which were set forth "the past and present State of his Health, and other circumstances touching his habits in life";—and that the policy contained a proviso, that "in case any untrue or fraudulent Allegation were contained in the said Declaration or statement, or if any fact which ought to have been stated therein, had been omitted therefrom, then the policy should be void";—with an averment that in the declaration or statement there was no un-

2. And when a party alleges a breach of common law duty which is denied by the defendant, he must bear the burden of proof whether the breach be malfeasance or nonfeasance, Dixon vs. Columbus R. R. Co., 4 Biss, 137; Horan vs. Weiler, 41 Pa. 470; but when the wrong is established the presumption changes and as between the wrong doer and the party injured, the presumption with re-

on which maxims are founded several presumptions of frequent occurrence in practice. Thus the law never supposes, in the absence of evidence to that effect, that any person has been guilty of a breach of its commands, or the violation of any rule of con-

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true or fraudulent Allegation, and that no fact which ought to have been stated therein, had been omitted therefrom, Plea,—that in the said statement it was alleged that the habits of the deceased were and had been sober and temperate,—which Allegation was untrue;—concluding with a verification, Replication, that the said Allegation was not untrue; concluding to the country &c.

At the trial before Park B, each party claimed the right to begin;—and the Huckman vs. Fernie 3 M. & W. 505, 2 Jur. 444, Rawlins vs. Desborough, 2 M. & Rob. 70; Geach vs. Ingals, 14 M. & W. 95 9 Jur. 691; Ashby vs. Bates. 15 M. & W. 589, were cited.

The Judge ruled this point in favor of the defendants on these grounds; first, the plaintiff in his declaration did not show what were the statements made by the assured in the delaration which he caused to be delivered unto the office of the society, but they were set out in the plea, and consequently must be proved by the defendants; secondly, the allegations of falsehood amounting to fraud in the assured, and must therefore be proved by the party making them, the presumption being always in favor of innocence and against fraud. As therefore, supposing no evidence were given in support of the plea, the plaintiff would be entitled to recover, the defendants ought to begin." Leete vs. The Gresh. Life Ins. Co., 15 Jur. 1162.

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spect to disputed facts are with the latter, Costigan vs. Mohawk &c. R. R. Co., 2 Denio, 609; Tin vs. Wharf Co. 7 Cal. 258; Loomis vs. Green, 7 Me. 389; and upon questions of doubt as to number, quality or value of articles taken by a purchaser, the presumptions are against the wrongdoer on the ground that it is his misconduct which has raised or rendered difficult the question. But this rule extends only so far as the misconduct is clearly proved. Evidence that some articles were taken wrongfully by defendandant does not warrant a presumption that others which were in the same place and are missing are also taken by him. Harris vs. Rosenburg, 43 Conn. 227; Taber vs. Jenny, Sprague, 315; also where the rights of private property are invaded by one whose acts would constitute a trespass, unless he can show he was justified by legal authority, he must be regarded as a trespasser;—*prima facie* he is liable, and the burden is upon him to show not design or intention to perform an official duty, but authority of law for the act complained of, Lumblom vs. Ramsey, 75 Ill., 246; 1 Curt. C. C. 439. So there is a presumption in favor of the owner of property against one who claims to be a *bona fide* purchaser from one obtaining the same by fraud, Stevens vs. Brenan, N. Y. January 1880, 9 Rept'r 281.

duct prescribed either by common or statute law; (3) and therefore, in all prosecutions whatever, whether for treason, felony, or *15 misdemeanor, the party accused is always entitled to be considered* innocent of the offence imputed to him, until his guilt has been clearly manifested by evidence (4); although, to establish the accusation, it may become requitite to prove a negative. Thus, in Rex vs. Combs, (*c*); where an information was exhibited against the defendant for perjury, in an affidavit in which he swore affirmatively to the truth of a proposition, it was held by the Court, that it lay on the other party to give probable evi dence, in the first instance, of the falsehood of the affirmative allegation. (5) And in Rex v. Lord Halifax, (*d*); which was an

(*c*) Comb. 57; 3 Jac. 2. (*d*) 2 Ev. Pot. 145.

3. It cannot be presumed that a licensed engineer who has taken an oath to perform his duty faithfully would obey illegal orders of the captain, McMahon vs. Davidson, 12 Minn. 357.

4. Proof beyond reasonable doubt is the language of the courts. But this does not mean that preponderence only of testimony is required. Presumptions, also must be taken into view. The evidence of guilt must preponderate over both the testimony to, and the presumption of innocence, Jones vs. Greaves, 26 Oh. State 2; Bur vs. Wilson, 22 Minn. 206; Werton vs. Gravlin, 49 Vt. 507. In criminal prosecutions the burden never shifts upon the defendant, except when he attempts to justify, Com. vs. Kimball, 24 Pick. 336; Ogletree vs. State, 28 Ala. 693; Com. vs. Dana, 2 Metc. (Mass.) 329, nor does a resort to the proof of an alibi change the burden on other questions of the case, Fife vs. Com. 28 Pa. 429, and a new trial will be granted if the court charge that the rule as to "reasonable doubt" is somewhat relaxed in the lesser grade of offenses, Warden vs. State, 18 Ga. 264; and proof beyond a reasonable doubt is necessary to establish a fact *against* a prisoner, preponderating proof which satisfies a jury of the fact is sufficient to establish a fact in his favor, People vs. Melgate, 5 Cal. 127. The language used by Dr. Whart. in his Ev. § 12 44 is that "reasonable doubt of guilt in criminal trials is ground for acquittal, in cases where, if we subtracted the probative force of the presumption of innocence, there might be a conviction."

The learned Doctor's error consists in treating by implication "reasonable doubt" as a defencive fact, "ground for acquittal"—when acquittal results as matter of law, on account of failure of proof, so long as there is *reasonable doubt*, there is no *prima facie* case by the State.

5. The indictment must point out the statements charged to be false and also contain a specific allegation of the falsehood of such false statement relied on for

information against the defendant for refusing to deliver up the rolls of the Auditor of the Exchequer, it was held, that it lay on the plaintiff to prove the negative, viz.: that he had not delivered them up; as it was his duty to have done so, and the law, in the absence of evidence, would presume that he had complied with it. (6)

§ 15. Nor is this principle confined to criminal proceedings, where the individual is put upon his trial to answer the charge of having violated the law; even in civil cases, where the conduct of a party comes in question collaterally, he is still entitled to the same presumption of innocence. (1) Thus, in the case of Chapman v. Pickersnill, (*a*); which was an action for falsely and maliciously suing out a commission of bankruptcy, which was afterward superseded; and after a verdict for plaintiff, it was moved, in arrest of judgment, that there was no averment that the plaintiff was not indebted to the defendant, or that he had never committed an act

(*a*) 2 Wils. 147.

6. "The general rule is, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it" Hartwell vs. Root, 19 Johns, 347, 3 East, 192, 10 Id. 216.

1. So held in Case vs. Case, 17 Cal. 598.

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a conviction, King vs. Perrott, 2 M. & S. 379, two witnesses are required as well to prove the facts sworn to as the falseness of the oath in perjury, State vs Howard, 4 McCord (S. C.) 159, and proof must be offered that the false oath was taken *wilfully* and corruptly, Green vs. State, 41 Ala. 419, State vs. Lea. 3 Id. 602; State vs. Carland. 3 Dev. (N. C.) 114. Juaragui vs. State 28 Tex. 627.

So in actions on the case for deceit in obtaining money or property under false pretences, Woodhull J. in Byard vs. Holmes, 5 Vr. 299, says, "that a mere general allegation that the matter stated was a pretence, and that the plaintiff was falsely and fraudently deceived by it, is not sufficient, either in criminal or civil cases, to fasten upon such matter the character of a false pretence, and that this can be done in no other way than by a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant and intended to be denied by the plaintiff," King vs. Perrott *supra*, Peop. vs. Storn, 9 Wend, 182, Peop. vs. Haynes, 11 Id. 557, Peop. vs. Gates, 13 Id. 311. The falsificatiuns must be distinct, affirmative and specific and not conjunctively—by way of negative pregnant, Byard vs. Holmes, *supra*.

of bankruptcy; but it was held by the Court, that the declaration would have been good even on demurrer, and *a fortiori* was sufficient after verdict; that in an action for words, for saying that the plaintiff was a thief, it is not requisite to aver that he *16 was not such, for the law would presume* his innocence. (2)

2. It is laid down in Whart. Ev. § 1246, that reasonable doubt of guilt to work an acquittal, does not apply to civil issues. And concludes (if any conclusion be possible from his comparisons) that the "better view is, that in civil issues the result should follow the preponderence of evidence, even though the result imputes crime. Woodhull J. in Kane vs. Hib. Mut. Fire Ins. Co., 9 Vr. 446, satisfactorily vindicates the rule in Thurtell v. Beaumont, 1 Bing. 339, wherein the defence set up was that the plaintiff had wilfully set fire to the premises, or had caused them to be set fire to. In charging the jury, the learned judge directed them, "that before they gave a verdict against the plaintiff, it was their duty to be satisfied that the crime of wilfully setting fire to the premises was as clearly brought home to him in this action, as would warrant their finding him guilty of the capital offence, if he had been tried before them on a criminal charge." In Chambers v. Shackell, *et. als.* 6 C. & P. 475,—an action on the case for libel, in charging the plaintiff with the forgery of a certain bill of exchange, the same doctrine was applied. On a plea of justification, stating in substance that the plaintiff had been guilty of forgery, &c. Tindal C. J. said to the jury, "We cannot consider the plea in any other way, or on any other kind of evidence, than if we were trying the plaintiff for the offence alleged in it," In Wilmet vs. Harmer, *et. al.* 8 C. & P. 695, it was held by Denman C. J. that a plea of justification to a libel, in which the defendant justifies on the ground that the plaintiff was guilty of bigamy, requires the same strictness of proof as is required on the trial of an indictment for bigamy. See Woodbeck vs. Keller, 6 Cow. 118; Clark v. Dibble, 16 Wend. 601; Hopkins v. Smith, 3 Barb, Steinman vs. McWilliams, 6 Barr. 170. The learned justice in Kane v. Hib. Mut. Ins. Co. *supra* concludes, "I remark that, whether applied to criminal or civil cases, the reason of the rule seems to me to be the same, and the rule itself rests upon precisely the same foundation, viz.: that the legal presumption in favor of innocence, a presumption which is not, as some seem to suppose an arbitrary contrivance to screen the guilty when under indictment,—but a conclusion of law drawn from general experience of human conduct, and designed to protect the innocent—a presumption of such potency that it can be overcome by nothing short of full and satisfactory proof—that is, by the highest measure of proof defined by the common law, as distinguished from that by mere preponderence of evidence. As the rule in question merely recognizes and gives effect to this universal presumption of law, I cannot think that it is either unreasonable or unjust." But the N. J. Ct. of App. reversed the decision of Justice Woodhull in Kane vs. Hib. Mut. Ins. Co., *supra*, which establishes the rule of

And in the case of Williams v. E. I. Company, (*b*); which was an action against the defendants for having put on board the plaintiff's ship (which they had hired to convey merchandise) a quantity of combustible matter, without giving him notice of its dangerous nature, through which negligence, his ship was burnt; Lord Ellenborough said, "There is a rule of law, that when any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary on the other side; that in that case the neglecting to give notice of the dangerous nature of the goods was such conduct as, if true, would subject the defendants to be prosecuted for a misdemeanor at least; and it was held, that it lay on the plaintiff to prove that no such notice had been given.

§ 16. On the same principal it is, that the law always presumes a child which has been born during wedlock to be legitimate, (1) (*a*); and this even though the husband and wife are living apart by mutual consent, (*b*); but in case of a divorce *a mensa et thoro*, which is a separation decreed by a Court of competent jurisdiction, the law will presume that the terms of the sentence have been complied with, and will deem issue born during that separation to be prima facie illegitimate. (*Ib.*)

Nor is the presumption of innocence confined to the parties actually before the Court as litigants in the cause; it is said by

(*b*) 3 East. 192. (*a*) 1 Phil. Ev. 146. (*b*) St. George vs. St. Margaret, 1 Salk. 123.

1. The presumption of legitimacy cannot be rebutted by slight evidence. Denkins vs. Samuel, 10 Rich. (S. C.) 66; Coujolle vs. Ferrie, 26 Barb. 117. And whether there was intercourse cannot be inquired of from either father or mother either directly or by aid of circumstances from which the result could be inferred, Chamberlain vs. Peop. 23 N. Y. 85; Boykin vs. Boykin, 70 N. C. 262; and a mother of a child begotten before marriage, though born after, is incompetent to prove that the child was not begotten by the husband, Dennison vs. Page, 29 Pa. 436. But this presumption may be overcome by competent proof that the husband was incapable on ground either of impotence or absence, of being the father of the child, Head vs. Head, 1 Sim. & S. 150; Cope vs. Cope, 1 M. & Rob. 269; 5 C. & P. 604; Morris vs. Davis, 3 C. & P. 215; Sullivan vs. Kelly, 3 Allen, 148.

Dr. Wart., *supra*, in N. J. But in the conflict of authority, the editor prefers the doctrine laid down by Woodhull as the more reasonable.

Buller J. in Ross v. Hunter, (*c*); that the Court cannot presume fraud (and a fortiori guilt) in a third party; and there seems to be no doubt of the correctness of this opinion.

§ 17. Where any particular forms are required to be gone *17 through, either by common or statute law, in order to* qualify a party to hold an office of which he is in the enjoyment or possession; (1) or where generally any particular course of proceeding has been prescribed by statute, the law always presumes that those forms have been gone through, and the requisitions of the act of parliament complied with. (2) Thus in the case of Monke v. Butler, (*a*); which was a suit in the Spiritual Court for tithes,

(*c*) 4 T. R. 33. (*a*) 1 Rol. R. 83.

1. Evidence of action as a public officer is *prima facie* evidence of appointment and qualification, (Allen vs. State, 21 Ga. 217; Wood vs. Terry, 4 Lans 80); and the return of Commissioners of Election throws the burden on the relator to show that bad votes were given for the incumbent, U. S. vs. Carberry, 2 Cr. C. C. 358; Rook & Wash. Turup. Co. vs. Van Nese, 2 Id. 449. An officer *de facto* is a person who is such by color of election, though inelligible, or though the office was not vacant, Gregg vs. Jamison, 55 Pa. 468; but he is a mere usurper if the office be not elective, People vs. Albertson, 8 How. Pr. 363; Wilcox vs. Smith, 5 Wend. 231; Plymoth vs. Painter, 17 Conn. 585; Rice vs. Com. 3 Bush. 14: Brown vs. Lunt, 37 Me. 423; Hooper vs. Goodwin, 48 Me. 79; Commis vs. McDaniels, 7 Jones (N. C.) L. 107.

The right of a person acting *colore officii* can be tried only in a proceeding to which he is a party, directly presenting the question, and not in a collateral way between third persons, Douglass vs. Wickwise, 19 Conn. 489; Tracy vs. Fuller, 13 Mich. 257; Dean vs. Thompson, 19 N. H. 290; Com. vs. McComb, 56 Pa. 436; and when the question of compatibility of two offices arises, the question turns upon the point of homogeniousness; one must not be judicial and the other ministerial. The functions of a county supervisor are chiefly ministerial, and those by a circuit clerk wholly so, and the discharge of the duties of the two by the same person are not incompatiable, State vs. Teibleman, 28 Ark. 424; and when a trial justice accepts a commission as deputy sheriff, his office as a trial justice is thereby vacated, being incompatible, Stubs vs. Lea, 64 Me. 195.

2. Brown J. in Peop. vs. White, 24 Wend. 525, says, "No principle is better settled than that the acts of such persons are valid when they concern the public or the rights of third persons who have an interest in the act done." Nelson vs. The Peop., 23 N. Y. 296; and in the absence of proof to the contrary the presumption is that officers, acting as such, have taken the proper oath, Nelson vs. Peop. supra, 1 Hill, 159; 21 Wend. 47; 3 Hill 75, 22 Barb 656.

the defendant pleaded that the plaintiff had not read the articles, as required by statute, which allegation he was called on by that Court to prove; and on his applying for a prohibition, it was refused by Coke C. J. and Doddridge J. who said, that in the absence of evidence the law would presume that those articles had been read by him. And in a case of tithes, by a rector, under 2 Ed. 6, (*b*); where it was objected for the defendant, that the plaintiff ought to prove his admission and institution, and also that he had read the articles of the church; it was ruled by the judge who presided that those circumstances were to be presumed, and if the fact were otherwise, it lay on the defendant to show it.

§ 18. The same doctrine has also been fully recognized and acted on in later times; in Powell v. Millbank, (*a*); which was an action brought to try the right to a donative; where, though the plaintiff was in orders, he neglected to prove at the trial that he had since his nomination subscribed the declaration required by 13 & 14 Car. 2, c. 4, for the uniformity of public prayers: and the Court of Common Pleas, on a case reserved, held that it was necessary for him to have proved that fact, as, in the absence of evidence to the contrary, his conformity with the requisites of the statute would be presumed. And in Rex v. Hawkins, (*b*); which was an information in the nature of a quo warranto, in order to *18 try the *merits of a controverted election to a corporate office; where it was objected to the defendant, that on his own admission he had not taken the sacrament within a year, as required by statute; to which was urged in his favour, that *non constabat*, that his opponent had not equally neglected to do so; it was held by the Court, that in the absence of evidence to the contrary, it was to be presumed that the other party had conformed to the law. (1)

(*b*) Clay R. Pleas of Assize 48. (*a*) 3 Wils. 355. (*b*) 10 East 211.

1. Upon an information for a *quo warranto*, the defendants in possession will be presumed to hold rightfully,—and the plaintiff's must take their case and go forward upon proof and argument, State vs. Hunton, 28 Vt. 594; but it would seem to be otherwise on *quo warranto* for usurping a franchise,—as the People or State has the *prima facie* title, and it lies with the defendant to show his war-

The old statutes (*a*) directed, and the modern one 7 G. 4, c. 64, directs, that when any person is brought before a magistrate on a charge of felony, the justice shall, previous to committing or bailing the party, take in writing the examination of the prisoner, and the depositions of the witnesses against him; and as it is always presumed that the provisions of an act of parliament have been complied with, it will be presumed here, that the examination of and depositions against a prisoner have been taken in writing;(*b*) and parol evidence of anything that may have been said before the committing magistrate is not admissible until it is proved not to have been so taken down.(*c*)

§ 19. In further pursuance of this principle the law presumes, that any duty imposed on a corporation (1) or an individual has been duly and regularly performed by him; (2) that a parson is

(*a*) 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10.

(*b*) 3 Stark. Ev. 1242.

(*c*) Phillips vs. Wimburn, 4 C. & P. 273.

1. The burden of showing the invalidity of a corporate contract rests with the assailant Ala. Life Ins. Co. vs. Central Ag. Ass. 54 Ala. 73; so is the presumption against *ultra vires* Galena vs. Corwith, 48 Ill. 423;—it will be presumed not to have exceeded its powers in taking a bond it sues on, McFarlan vs. Triton, Ins. Co. 4 Denio 392, and debts due to it will be presumed to have been contracted in the lawful course of business, N. Y. Firemen's Ins. Co. vs. Sturges, 2 Cow. 664,—so the indorsee of a corporation has a right to presume that it was transferred in pursuance of a resolution of the board of directors, Aiken vs. Blanchard, 32 Barb. 527, 33 Ib. 336.—but no presumption of power on the part of a municipal corporation to issue negotiouable paper pledging its credit by implication or construction, per Dillon, Gause vs. City of Clarksville, 18 Law Reg. 479, or a national B'k to enter into a contract of guarranty Seligman vs. Sharlottsville, Nt. B'k. 9 Reporter 72. And it is said that the presumption that public officers have performed their official duty does not apply to the proceedings of a municipal legislature, Granger vs. Buffalo, 6 Abb. N. C. 239, so there is no presumption that municipal agents are acting within their authority, Smith vs. Newburgh, 19 Alb. L. J. 397.

2. The averment of neglect of official duty must be supported by some proof by the party making it, though very little evidence will suffice to shift the bur-

rant for exercising it, Peop. vs. Utica Ins. Co., 15 Johns 358; 1 Ark. 513; 3 Id. 580; not guilty or non *usurpavit* is not a good answer in *quo warranto;* it should be a justification or a disclaimer, Attorney Gen'l. vs. Foote, 11 Wis. 14.

always resident on his benefice, (1) (*a*) that the judgment of a Court of competent jurisdiction are well founded; (2) that

(*a*) Co. Litt. 78 b.

1. A residence in law once obtained, continues without intermission until a new one is gained, Cadwallader vs. Howell, 3 Harr. (N. J.) 138; 3 Vr. 192.

2. Bk. U. S. vs. Dandridge, 12 Wheat, 69; Florentim vs. Barton, 2 Wall. 210; Cofield vs. McClelland, 16 Id. 331; McNitt vs. Turner, id. 352; Garneharts vs U. S. Id. 162; Pittsburg R. R. vs. Ramsey, 22 Id. 322; Ready vs. Scott, 23 Id. 352; Stearns vs. Stearns, 32 Vt. 678; Cowen vs. Bolkom, 3 Pick. 281; Scherhorne vs. Talman, 14 N. Y. 93; Cromelien vs. Brink, 29 Pa. 522; State vs. Lewis, 22 N. J. L. 564,—so when damages are assessed, it will be presumed that they were assessed on a good cause of action, when such is averred; Barnes vs. Jennings, 40 Vt. 45,—and where jurisdiction is averred, all the facts necessary to constitute jurisdiction will be presumed; Ray vs. Rowley, 4 Thomp. & C., 43, 1 Hun. 614. Judicial records are presumed to have been correctly made; Reed vs. Jackson, 1 East. 355; Ramsbottom vs. Buckhurst, 2 M. & Sel. 567; R. vs. Carlisle, 2 B. & Ad. 367; and when regular they cannot except in cases of fraud or non-jurisdiction be collaterally impeached; Glyan vs. Thorpe, 1 Barn. & A. 153; Amory vs. Amory, 3 Biss. 266; Fass. vs. Edwards, 47 Mc. 145; Willard vs. Whitney, 49 Me. 235; Douglass vs. Wickmire, 19 Conn. 489; Dows vs. Mc-

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den of proof, Dobbs vs. Justice, 17 Ga.—; Dollarhide vs. Muskatine Co., 1 Greene 158; Lea vs. Polk Co, Cap Co. 21 How. 493; Guy vs. Washburn, 23 Cal. 111; Todemier vs. Aspinwall, 43 Ill. 401; Mercer vs. Doe, 6 Ind. 80; State vs. Bailey, 16 Id. 46; Jenkius vs. Porkhill, 25 Id. 473; Ellis vs. Garr, 1 Bush. 527; Hartwell vs. Root, 19 Johns, 445; Kelly vs. —, 58 Pa. 302; Sennett vs. State 17 Tex. 308; and a deliuquency of a sheriff will not be presumed without a preponderence of proof, Stevens vs. Deats, 12 Vr. 340; 6 Id. 392; 11 Id. 356. But the law will not supply an independent fact, U. S. vs. Ross, 2 Otto. 283, so when the law has made the action of one officer, a requisite preliminary to that of another, a performance of duty by the one who should first act, will not be presumed in aid of an action against the other for non-performance, Soup. of Houghton vs. Rees, 34 Mich. 481, Best on Ev. § 300.

When a wife files a bill to avoid a mortgage made on the homestead of her husband during the family occupancy of it on the ground that she never knowingly signed or acknowledged it, all presumptions in case of conflict of testimony must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of forgery which he ought to have discovered if it existed, and the burden is on the complainant to make out a plain case, Hourtieum vs. Schvoor, 33 Mich. 274, But in all these cases the official proceedings must appear on their face to be regular, Welsh vs. Cochran, 63, N. Y. 181.

judges, juries, and officers of justice do nothing maliciously, &c., &c. (1)

It is another branch of the rule, "odiosa et inhonesta non sunt præsumenda," that the law never presumes fraud or covin, but always the reverse. (2) And if the conduct of a party, or a deed,

1. Where the act is judicial, and done *pendente lite*, no action lies, however wrongful and injurious to the party, whether the act was done *mala fides* or with the most honest intentions, provided the justice had jurisdiction of the parties and the subject matter of the suit. Nothing depends upon the *quo animo* with which the act was done, but upon the right and authority of the officer to do it. Taylor vs. Doremus, 1 Harr. (N. J.) 473; Mangold vs. Thorpe, 4 Yr. 134.

2. Good faith in business transactions is a well-settled presumption of law; Hagar vs. Thompson, 1 Black. 80; Cooper vs. Galbath, 3 Wash. 546; Blaidsdell vs. Crowell, 14 Me. 370; Sulter vs. Lackman, 39 Mo. 91 Roberts vs. Gurnsey, 3 Grant (Pa.) 237; Reeves vs. Dougherty, 7 Yerg. 222; Richards vs. Kountze, 4 Neb. 200; Bumpus vs. Fisher, 21 Tex. 561; Greenwood vs. Lowe, 7 La. An. 197, and the burden of proof is on the party who assails *good faith and legality*, Sutters vs. Lackman, 39 Mo. 910; Silvers vs. Hedges, 3 Dana 439; Ross vs. Drunkard, 35 Ala. 434; Evans vs. Evans, 2 Coldw. 143; Reed vs. Nixon, 48 Ill. 323; Wilson vs. Lazier, 11 Gratt. 477. Fraud cannot be presumed, unless the circumstances on which such presumption is founded are so strong and pregnant that no other reasonable conclusion can be drawn from them, Baxton vs. Boice, 1 Tex. 317; even strong presumptive circumstances of fraud will not outweigh positive testimony against it, Short vs. Staple 1 Gall. 104; and it is held that a representation, made without intent to deceive, in the belief that it is true, whether it be a representation imputing the existence of a fact or imparting knowledge of the fact, is not, *per se*, a fraud for which an action will lie, whatever the representation may be; it is in such actions a question, and a vital question, whether it was fraudulently made: that it was made improvidently or indiscreetly is not enough.

Falsehood—the intent to deceive and damage—must concur, Parsley vs. Free-

Michael, 6 Paige 139; Hageman vs. Salisbury, 74 Pa. 280; Roy vs. Townsend, 78 Id. 329; Quinn vs. Com., 20 Gratt. 138; So. B'k vs. Humphreys, 47 Ills. 227; Farley vs. Budd, 14 Iowa 289; and when the records are made up erroneously, the Court of Record must be applied to for relief, Trafton vs. Rogers, 13 Me. 315; Cone vs. Bullard, 9 Mass. 270; Brier vs. Woodbury, 1 Pick. 362; Gardner vs. Humphrey, 10 Johns, 53; Clammer vs. State, 9 Gill. 279; Jenkins vs. Long, 23 Ind. 460; Com. vs. Judges of Com. Pleas. 1 Serg. & R. 192; Clymer vs. Thomas, 7 Id. 180.

or writing, be susceptible of two constructions, (1) one conveying *19 a meaning which the law would *carry into effect as lawful

1. The possession of an order by him on whom it is drawn is *prima facie* evidence that the articles therein specified were delivered according to request, Kincaid vs. Kincaid, 8 Humph. 181; and it is the duty of a party who alleges a fact which would deprive his adversary of a sum apparently due him and evidenced by proper vouchers, to give some testimony of that fact, be it ever so slight, before submitting it to a jury, Zerbe vs. Miller, 16 Pa. 488. So in an indictment against a man and woman for living together as husband and wife without being married, it is incumbent on the State to establish, by *prima facie* evidence, at least, that the parties are not husband and wife, Hopper vs. State, 19 Ark. 143. But if the transaction in point of law be unfair, no such prescription obtains Loomas vs. Green, 7 Greenl. 386; Short vs. Staple, 1 Gall, 104.

Castigon vs. Mohawk, &c., Co., 2 Denio 609; Hair vs. Little, 28 Ala. 236; Sheils vs. West, 17 Cal. 324; Paxton vs. Boyce, 1 Tex. 317; Finn vs. Wharf Co., 7 Cal, 253. And in trust and fiduciary relations of all denominations, unfairness will be inferred and presumed; and the burden is on the party claiming under such relation to prove the perfect fairness, adequacy and equity of the transactions, and that, too, by proof entirely independent of the instrument under which he may claim, Cumb. C. I. Co. vs. Parish, 42 Md. 598; Street vs. Goss, 62 Mo. 226; Clarke vs. Lamotte, 15 Beav. 240; Walker vs. Smith, 29 Id. 396; Wistar's Appeal, 54 Pa. 60; Brown vs. Bulkley, 13 N. J. Eq. 451; Uhlich vs. Muhlke. 61 Ill. 499; Hunter vs. Atkins, 3 Myl. & K. 135. So of a broker to sell, who is at the same time a broker to buy. If this double agency be unknown

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man, 3 T. R. 51; Addington vs. Allen, 11 Wend. 374; Marsh vs. Falker, 40 N. Y. 562; Haycraft vs. Creasy, 2 East, 92; Russel vs. Clark's Ex'rs, 7 Cr. 69, 93; Myer vs. Amedon, 45 N. Y. 168; Horan vs. Weiler, 41 Pa. 570; Calvert vs. Carter, 18 Md. 73; Wilson vs. Lazier, 11 Gratt. 477; Shehann vs. Davis, 17 Ohio St. 371; Ewing vs. Gray, 12 Ind. 64; Bullock vs. Narrott 49 Ill. 62; Waddington vs. Loker, 44 Mo. 132. Nor can fraud be predicted upon a mere promise to be performed in the future, Rorshmider vs. Knickerbocker Life Ins. Co., N. Y., May 21, 1878.

An insolvent debtor when he renders a schedule of his property and debts, is presumed to tell the truth and not commit perjury, Harlett vs. Hewlett, 4 Edw. Ch. 7. See Willson vs. Melvin, 13 Gray 73.

In an action by a husband to recover damages from defendant for assisting his wife to leave him, the assistance being at the request of the wife alleging ill usage, the burden is on the plaintiff to prove an unlawful motive or design on defendant's part, Barnes vs. Allen, 1 Abb. N. Y. App. Dec. 111.

and another which would be illegal, the parties will always be presumed to have contemplated the former;(1)(*b*) as if a tenant in tail makes a lease for life generally, without saying for whose life, it will be presumed that he meant for his own, as that is an estate which he can lawfully make; whereas had the lease been for the life of the lessee, it would work a discontinuance, (*c*).

When acts have been done by parties, or conveyances made by them, the law endeavors as far as possible to give those acts effect, and prevent their becoming void and inoperative; (2) and accord-

(*b*) Co. Litt. 78 b. (*c*) Id. 42, a & b.

1. Atkyns vs. Horde, 1 Burr. 106; Lewis vs. Davidson, 4 M. & W. 654; Marsh vs. Whitmore, 21 Wall. 178; Tucker vs. Meeks. 2 Sw. (N. Y.) 736; Foster vs. Rockwell, 104 Mass. 167.

When there is a doubt as to the existence of a trust, the burden of proof lies on the party who alleges it, Prevost vs Gratz, 6 Wheat. 481; Att'y Gen'l vs. Reformed Dutch Church, 33 Barb. 303.

The burden of proof is on a trustee in a suit against him for an account of specific articles, Horry vs. Glover, Riley (S. C.) Eq. 53.

Where a person standing in a confidential relation to an intemperate executor who has wasted the estate, is found in possession of part of the assets, in a suit by a creditor to follow such assets, it is incumbent on him to show that he purchased fairly and paid the price, Barna Well vs. Triadgill, a Jones (N. C.) Eq. 50 Wistar's Appeal, 54, Pa. St. 60.

2. While a person is presumed to know the legal effect of his contract (Mears vs. Graham, 8 Black. 144), although he cannot read or write (Harris vs. Story, 2 E. D. Sm. 363, and Bank vs. Kimbal, 10 Cash, 373), yet a clause, even in a contract susceptible of two constructions, will be taken in that sense which will give it some operation instead of one that will give it none, Archbold vs. Thomas 2 Cow. 284; Hunter vs. Anthony, 8 Jones (N. C.) 385; Pickham vs. Huddock, 36 Ill. 38; Lynch vs. Livingston, 8 Barb. 463; 6 N. Y. 422; Evans vs. Sanders, 8 Port Ala. 497. And a construction rendering a contract illegal will be rejected if a consistent legal construction can be made, Merrill vs. Melchoir, 30 Miss 516; Alcott vs. Tioga R. R. Co., 27 N. Y. 546; Patrick vs. Grant, 14 Me. 233. And to refuse such an instruction is error, Smith & Bennett vs. State, 12 Vr. 396. And it is held that the law presumes that when parties enter into contracts, they

to the principals, it is a breach of his implied contract with each; and he cannot recover for his services, irrespective of the advantages to the parties, Duryee vs. Lester, 75 N. Y. 442.

ingly lays down as a maxim, "Omnia præsumuntur legitime facta, (or solemnite et rite esse acta,) donec probetur in contrarium.(*d*) Thus where a fine has been levied, it will be presumed that it was with proclamations,(*e*) and if a feoffment be declared on, attornment will be presumed.(1)(*f*)

(*d*) Id. 232 b. (*e*) 3 Co. 80 b. (*f*) 3 Stark. Ev. 1242.

1. Documents, on their face solemnly executed, are presumed to have been executed in conformity with the local law of the place of execution, Roberts vs. Pillow, 1 Hemst. 624; R. vs. Gray, 10 B. & C. 807; R. vs. Ashburton, 8 Q. B. 876; R. vs. Whiston, 4 A. & E. 667; Diehl vs. Emig, 65 Pa. 320; State vs. Lawson, 14 Ark. 114; People vs. Snyder, 41 N. Y. 397; 51 Barb. 589. So when notices, affidavits, &c., are directed to be preserved in a particular office, a failure to find them there raises a presumption that no such document existed, Merrill vs. Douglass, 14 Kans. 293; Hall vs. Kellogg, 16 Mich. 135. In assessments of taxes for *general* purposes, every presumption is in favor of the regularity of the tax imposed, Harned vs. Manning, 12 Vr. 278; Doughty vs. Hope, 3 Denio 595; 1 Comst. 79; 9 Otto 441. Recitals in a sheriff's deed are not *prima facie* evidence of facts stated in them, except as to those recitals which the law requires to be inserted, Marsh vs. The City of Brooklyn, 59 N. Y. 280; Brown vs. Goodwin et als., 75 N. Y. 413,—as his acts are not judicial. An appearance will be taken to be a general one, unless the contrary appear, Dreshler vs. ————, 1 Morr. 403. The presumption is that a defendant on trial continues in court *de die in diem* to the end, Smith and Bennett vs. State, 12 Vr. 352.

When a wife files a bill to avoid a mortgage made on the homestead of her husband, during the family occupancy of it, on the ground that she never knowingly signed or acknowledged it, all presumptions in case of conflict of testimony must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of forgery, which he ought to have discovered if it existed, and the burden is on the complainant to make out a plain case, Hourtienm vs. Schvoor, 33 Mich. 274.

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intend performance; and that they are supposed, if two systems of law are before them—by one of which the contract would be good, the other bad—to incorporate into the contract the law which would make the contract operative, Cutter vs. Wright, 22 N. Y. 472; Kilgore vs. ————, 25 O. St. 413; Kenyon vs. Smith, 24 Ind. 11; Smith vs. Whitacre, 23 Ill. 367; Hunt vs. Jones, R. I., Feb., 1880; 8 Reporter 590. So a promissory note, which was dated and delivered in Maine, where it is a legal obligation, was signed and mailed in Massachusetts, where it was void, will be construed to be a contract in the former State, Bell vs. Packard, 69 Me. 8 Reporter 590.

§ 20. But although the law never presumes guilt and fraud in the first instance, yet it is held, that where a homicide has once been proved, the law will presume that it was done maliciously, (1) and casts on the party accused the onus of proving either his complete justification or excuse, or such palliating circumstances as may reduce the offence to manslaughter, (*a*) (2). And it is laid down as a maxim, "Qui semel est malus, semper præsumitur esse malus in eodem genere," (3) (*b*), and as a general principle which

(*a*) Forster's C. L. 255. (*b*) 2 Stark. Ev. 687.

1. While the law implies malice on the proof of voluntary homicide, it does not impute "express" malice. Tarrer vs. State, 42 Tex. 272. "Express malice," which is the essential constituent of murder in the first degree, is never inferred or implied alone from the act done or the means used in doing it, it must be proved *aliunde*, like any other fact in the case, by such evidence as to satisfy and convince the jury of its existence, Richarte vs. the State, Tex. Feb. 67, 1879, 8 Rep't'r 63; and the rule that a man is to be taken to have intended the probable results of his own acts, is, at most, but a rule of evidence to be applied by the triers in inquiring into the intent, and is never a rule of law, Quinebaug Bk. vs. Brewster, 30 Conn. 599; State vs. Patterson, 45 Vt. 308.

2. All murders are presumed by law to be murder in the second degree. In order to elevate the offence to murder in the first degree, the *onus probandi* is on the prosecution, and to reduce the offence to manslaughter the *onus* is on the prisoner, Willis vs. the Com., Va. Nov. 1879, 9 Rept'r 157.

Voluntary immediate drunkenness is inadmissable to disprove malice, or to reduce offence to manslaughter; 1d. Com. vs. Jones, 1 Leigh 612; Pirtle vs. State, 9 Humph 664; Swan vs. State, 4 ib, 136; Boswell vs. Com. 20 Gratt. 860.

3. General or continuing insanity having been shown within a reasonable time before that, the burden is thrown upon the other party to show a lucid interval

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But that all things have been solemly done in courts only applies when jurisdiction is clearly vested, Pittsburg vs. Walters, 69 Pa. 395; Allen vs. Sowerby, 37 Md. 410; Hicks vs. Hayward, 4 Heisk. 598; Buchannan vs. King, 22 Gratt. 414; Markman vs Boyd, 1d. 544; and when a summary proceeding is given by statute and in derogation of common law, the necessary jurisdiction must appear affirmatively on the face of the record on the proceeding by void, Graver vs. Fell, 7 W. Notes Cas. No. 27 (Pa.) 1 Barr. 126; and certiorari can be taken at any time if the proceedings are *coram non judice*, independent of limitation law, Id. 7 Harris 495; 1 Ash. 230; but if the court have competent jurisdiction, a proper writ will be deemed to have issued, Corry vs. Miller. R. I., May 3, 1879; 8 Reporter 698; Gosset vs. Howard, 10 Q. B. 411, 453.

is very extensively acted on, that "omnia præsumuntur contra spoliatorem," (1) (*c*).

(*c*) 1 Stark. Ev. 500.

1. When testimony has been mutilated, suppressed or destroyed, the party so mutilating, if he would make use of it, must show that the original character of the testimony was not thereby affected, Joannes vs. Bennett, 5 Allen 169; Gardiner vs. Peop. 6 Park. C. R. 156; Blake vs. Fish, 44 Ill, 302; Shields vs. West, 17 Cal. 324; State vs. Knapp, 45 N. H., 148; or that among the several probable interpretations of the instrument that which is most unfavorable to him will be adopted, Haldane vs. Harvey, 4 Burr, 2484; R. vs. Arundel Hob. 109; White vs. Lincoln, 8 Ves. 363; McDonough vs. O'Neil, 113 Mass. 92; Merwin vs. Ward, 15 Conn., 377; Little vs Marsh, 2 Ired. Eq. 18,—so there is a presumption against all forms of attempted suppression of, or tampering with, evidence Moriar vs. R. R. L. R. 5 Q. B., 314; Carlewis vs. Cerfield, 1 Q. B., 814; Bell vs. Frankis, 4 M. & Gr., 446; Thayer vs. Stearns, 1 Pick. 109; Grimes vs. Kimball, 3 Allen, 518; Peop. vs. Rathburn, 21 Wend. 509; Meyer vs. Barker 6 Binn., 228; Reed vs. Dickey, 1 Watts., 152; Page vs. Stephens, 23 Mich., 357; Peop. vs. Marion, 29 Mich. 31; Winchell vs. Edwards, 57 Ill. 41,—as when a finder of a lost jewel, refuses to produce it,—the inference is that it is a jewel of the highest probable value, Armony vs. Delamarie, 1 Str. 505, 1 Sm. L. C. 301; Mortimer vs. Craddock, 7 Jur. 45,—so if an accounting party parts with or destroys his books, the strongest inferences, consistent with the rest of the case will be made against him, Gray vs. Haig, 20 Beav. 231,—and a destruction of a contract by one claiming under it, after he knows there is to be a difficulty about it, is strong presumptive evidence that its terms were unfavorable to his claims, Warner vs. Crew., 22 Iowa 315; but there is no such presumption when a party is prevented from producing goods by causes in no way implying dishonesty, but merely negligence, Claunes vs. Perry, 1 Camp. 8, Lord Mansfield observed in Blatch vs. Archer, Cowp. 65, that "it is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted, Wallace vs. Harris, 32 Mich. 394,—and in general, neglect to produce evidence or a witness known to be in one's power is suspicious and thus evidence against him, Williams vs. Com, Pa. Feb. 2, 1880, 9 Reporter 453; Fowler vs. Sergeant, 1 Grant Pa. 358, & 121; or declining to testify in one's own behalf upon what he knows pertinent to the case is a circumstance for the jury; Jackson vs. Blanton, 58 Tenn. 63; when the burden is thrown

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at the time of the act, Dicken vs. Johnson, 7 Geo. 488,—evidence of the cessation of the symptoms is not enough, but there must be evidence of sufficient restoration to act intelligently and freely, Lucas vs. Parsons, 27 id. 593; Boyd vs. Eby, 8 Watts. 66, *ex parte* Holyland, 11 ves. 10.

Many strong presumptions of law are founded on the known and ordinary course of nature, (1) thus the law will not pre-sup-

1. As that the shock produced by the meeting of a railroad train, upon encountering an obstruction, is in proportion to momentum, R. vs. Paryeter, 3 Cox. C. C. 191; Caswell vs. R. R., 98 Mass. 194; Wilds vs. R. R., 29 N. Y. 315; Jones vs. R. R. 67 N. C. 125—so in regard to the revolution of the seasons and the ordinary laws of vegetables and animals, Patterson vs. McCausland, 3 Bland (Md.) 69. But sequences and occurrences must be unvarying; vicissitudes of climate and seasons must be proved, Dickson vs. Nichols, 39 Ill. 372; magnetic variations, Bryan vs. Beckley, 6 Lytt. (Ky.) 109; that animals will act according to their nature, Carlton vs. Hescock, 107 Mass. 410; Rowe vs. Bird, 48 Vt. 578; that horses will take fright at extraordinary noises and sights, Lake vs. Milliken, 62 Me. 240; Jones vs. R. R., 107 Mass. 261; Judd vs. Fargo, id. 265; Peop. vs. Cunningham, 1 Denio 524; Congreve vs. Morgan, 18 N. Y. 84; Moreland vs. Mitchell Co., 40 Iowa 394; but when the burden is on the party to prove a *scienter* on the owner of a michievous animal, it is admissible to put in evidence particular facts, Worth vs. Gilling L. R. Q. C. P. 1; Judge vs. Cox, 1 Stark. R. 285; Kittridge, vs. Ellott, 16 N. H. 77; Whikier vs. Franklin, 46 N. H. 23; Arnold vs. Norton, 25 Conn. 92; Buckley vs. Leonard, 4 Denio 500; as well as general reputation, Whart. on Neg., § 924; that certain kinds of dogs will worry sheep, Reed vs. Edwards, 17 C. B. N. S. 245; Marsh vs. Jones, 21 Vt. 378; Wolf vs. Chalker, 31 Conn. 121; Swift vs. Appleton, 23 Mich. 252; but the habits or

on the defendant by law and not otherwise; Chaffer & Co. vs. U. S., 18 Wall. 545; Anderson vs. Russell, 34 Mich. 109; Com. vs. Hardiman, 9 Gray, 136, Gragg vs. Wagner, 77 N. C. 246. So in Platt *et als* vs. Platt, 58 N. Y. 648. "It appeared upon the trial that defendant had certain books of the partnership business which he refused to produce when required by the court so to do. Plaintiffs were permitted to ask a witness acquainted with the kind of business carried on, how much capital it would take to carry on the business of the partnership. A witness for defendant was asked the same question. This was objected to upon the ground that the books should be produced, and objection sustained. *Held*, no error; that for the contumacy of defendant in refusing to produce the books the court had the right to prevent him *from meeting* the secondary proof of plaintiff's with like proof." Citing Bogart vs. Brown, 9 Pick. 18—wherein Worton, J., says: "The defendant had the original in his possession, which he refused to produce. Upon what ground can he now pretend that this secondary evidence ought to be used by the party who withholds the primary? To permit it would be to overturn obvious and well-settled principles of law, and to encourage unworthy artifices." But no presumption will indulge against a party for failing to call his opponent as a witness, Bleeker vs. Johnson, 69 N. Y. 309.

pose idiotcy, (1) and never in the case of any individual presumes *20 a deficiency of those natural powers, or capabilities *of mind or body, which are incident to the human race in general, (2). Thus, it never presumes insanity, (3) (*d*), or the absence of the powers of generation in the one sex, or sterility in the other, or want of common sense and understanding:(*e*) and in furtherance of this lays down as a principle, that every person must

(*d*) 1 H. P. C. 33. (*e*) Hub. Prœl. J. C. lib. 22, tit. 3.

1. The presumption is that every person is capable of asserting his rights—disability must be asserted and proved, Palmer vs. Wright, 58 Ind. 486.

2. The burden of proving insanity is upon the one who alleges it, State vs. Brown, 12 Minn. 538, and evidence of insanity is not necessary to be given in the first instance from the prosecution in criminal cases, U. S. vs. Lawrence, 4 Cr. C. C. 514; U. S. vs. McClue, 1 Curt, 1; O'Brien vs. People, 48 Barb. 274.

3. That an intestate has left heirs is a presumption so violent that it must be repelled by proof, Harvey vs. Thornton, 14 Ill. 217; Hays vs. Gribble, 3 B. Mon. 106; Schuchfield vs. Emmerson, 52 Me. 465; Thomas vs. Frederick Co. School, 7 Gill and J. 369; but some authorities assert there is no presumption but burden of proof, Emerson vs. White, 29 N. H. 482.

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temper of a single one of a species is presumed from the habits of the *genus*, not the habits of the *genus* from individual species, Collins vs. Dorchester, 6 Cush. 396; Hawks vs. Clearlemont, 110 Mass. 110.

It will be presumed that persons will be passing in a thoroughfare in such numbers as to make it dangerous to discharge at random a gun towards such thoroughfare, Peop. vs. Fuller, 2 Park C. R. 16; Triscol vs. Newark Co., 37 N. Y. 673; Sparks vs Com., 3 Bush. 111; State vs. Vance, 17 Iowa 138; Bizzell vs. Booker, 16 Ark. 308; that a sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd, Scott vs. Shepherd. 2 W. Black. 892; Guelle vs. Swan, 19 Johns. 381; Fairbanks vs. Kerr, 70 Pa. 86; and that persons in a fright will act instinctively and convulsively, R. vs. Pitts, C. & M. 284; Sears vs. Dennis, 105 Mass. 310; Coulter vs. Exp. Co., 5 Lans. 67; Buel vs. R. R., 31 N. Y. 314; Frink vs. Potter, 17 Ill. 406; Greenleaf vs. R. R., 29 Iowa 47.

The courts will recognize judicially matters of public history affecting the whole people, Payne vs. Treadwell, 16 Call. 220; Hart vs. Bodley, Hard. (Ky.) 98; Bell vs. Burnett, 2 J. J. Marsh. 516; but not of facts of recent occurrence, relating to a particular section of the country only, Morris vs. Edwards, O. 189, and the jury must not be left to their own information on the subject, Gregory vs. Baugh, 4 Rand. Va. 611; McKinnon vs. Bliss, 21 N. Y. 206, as the depreciation of the currency during the rebellion, Modawell vs. Holmes, 40 Ala. 391.

be presumed to have intended the natural consequences of any (1) act which he may have deliberately done, (*f*). Also, matters tending to vitiate a contract will not be presumed, nor any incapacity in either of the parties to contract; such an infancy, lunacy, coverture, and such like. And in the case of infants under seven, the law presumes that they are "doli incapaces," and incapable of distinguishing between right and wrong, at least when charged with felony, (2) (*g*).

§ 21. Once the existence of a particular state of things have been proved, the law will, in the absence of evidence to the contrary, presume its continuance, (3). Thus an individual who is

(*f*) 1 Stark. Ev. 1254. (*g*) 1 H. P. C. 25.

1. As that a person is presumed to know the legal effect of his contract, Mears vs. Graham, 8 Blackf. 144; even if he cannot read or write, Harris vs. Story, 2 E. D. Sm. 363; Andrascoggin Bank vs. Kimbal, 10 Cush. 373.

2. This presumption is irrebuttable, State vs. Goin, 9 Humph. 175; Godfrey vs. State, 31 Ala., 323; R. vs. Owen, 4 C. & P. 236; between seven and fourteen the presumption is rebuttable by proof that the defendant is capable of crime, Com. vs. Mead, 10 Allen 398; 1 Green Cr. R. 402; R. vs. Smith, 1 Cox. C. C. 260; a boy under fourteen is incapable of rape, as principal in the first degree, R. vs. Phillips, 8 C. & P. 736; R. vs. Jordan, 9 C. & P. 118; 1 Green Cr. R. 402; and this applies to the act of carnally abusing a girl under ten years of age, R. vs. Jordan, *supra*; hence, an action for false imprisonment lies for the arrest of such an infant under charge of felony, Mash vs. Loader, 14 C. B. N. S. 535; so they cannot be convicted with an assault with intent to ravish, R. vs. Eldershaw, 3 C. & P. 396; R. vs. Phillips, 8 C. & P. 736.

3. Until some change is shown to have occurred, Eames vs. Eames, 41 N. H. 177; Montgomery Plank Road Co. vs. Webb, 27 Ala. 618; Sullivan vs. Goldman, 19 La. Ann. 12; Mullen vs. Pryor, 12 Mo. 307; Leport vs. Todd, 32 N. J. L. 124; People vs. McLeod, 1 Hill 377; Hood vs. Hood, 2 Grant (Pa.) 229; Brown vs. Burnham, 28 Me. 38; Brown vs. King, 5 Metc. 173; O'Neil vs. N. Y. Mining Co., 3 Nev. 141; Bell vs. Young, 1 Grant (Pa.) 175; Farr vs. Payne, 40 Vt. 615; the burden is on the purchaser to show a loss or waver of the vendor's lien, Hays vs. Horin, 12 Iowa 61; the continuance of a debt will be presumed till payment be shown, Jackson vs. Irvin, 2 Camp 50; so a continuance of residence in a particular place, Church vs. Rowell, 49 Me. 367; Littlefield vs. Brooks, 50 id. 475; Shaw vs. Shaw, 78 Mass. 158; Goldie vs. McDonald, 78 Ill. 605; and Hunt, C., in Wilkins vs. Earle, 44 N. Y. 172, says: "A partnership once established is presumed to continue. Life is presumed to exist. Possession

once proved to have existed, will be presumed to be still alive, (*a*) unless the contrary is shown either by direct or presumptive evidence. And although, as has been already observed, the law never presumes insanity, yet that a general state of mind in a particular person once proved, it lies on a party who asserts the patient to have been in a lucid interval at a particular subsequent period, to prove his assertion, (1) (*b*).

§ 22. Several presumptions of law are based on principles of public policy and convenience. (2) Thus it is always presumed

(*a*) 3 Stark. Ev. 1120; Throgmorton vs. Walter, 2 Rol. R. 461; Wilson v. Hodges, 2 East 312.

(*b*) 3 Stark. Ev. 1702.

1. A person proved to have been insane at any time is presumed to remain so until the contrary is proved, Sprague vs. Duel, 1 Clark Ch. 90; Saxon vs. Whiteacre, 30 Ala. 237; Breed vs. Pratt, 18 Pick. 115; Ballew vs. Clark, 2 Ired. (N. C.) L. 23; Tellew vs. Tellew, 54 Pa. 216; Ripley vs. Babcock, 13 Wis. 425; but this presumption does not obtain when insanity is proved to be caused by violent disease, Hix vs. Whettemore, 4 Metc. 545.

The general competence of the testator not being questioned, the burden of proving incompetency at the time the will was executed is on the contestant, and affirmative proof is necessary, Allen vs. Pub. Adm., 1 Bradf. 378; Phelps vs. Hartwell, 1 Mass. 71; Hubbard vs. Hubbard, 6 Mass. 397; Singleton's Will, 8 Dana 315. But see Crowningshield vs. Crowningshield, 2 Gray 524; Horn vs. Pullman, 72 N. Y. 269.

2. It is clearly against the policy of the law to let an interested person sit as judge or juror, Rail R. Co. vs. Barnes, 40 Mich.; that the law of another State is the same as the law of the former, First Nat. Bank vs. Fourth National Bank, 77 N. Y. 320; that premiums have been paid on a policy rather than lapse, Her.

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is presumed to continue. The fact that a man was a gambler twenty months since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence, Walrod vs. Ball, 9 Barb. 271; Cooper vs. Dedrick, 22 ib. 516; Smith vs. Smith, 4 Paige 432; McMahon vs. Harrison, 2 Seld. 443; Sleeper vs. Van Middlesworth, 4 Denio 431; Nixon vs. Palmer, 10 Barb. 175. This analogy is fairly applicable to the present case, and justifies the admission of this evidence," 7 Q. B. 158. More than fifteen years occupation without demand of rent will authorize a presumption of a life estate, Selleck vs. Starr, 5 Vt. 255. An owner of land in possession is presumed to hold under his fee until it is shown that he holds under an estate adverse and not subordinate to his fee, Tenney vs. Wolston, 41 Ill. 215.

that a bill of exchange was passed to the holder for good consideration, (1) (*a*). And a deed thirty years old, which has been

(*a*) 3 Bl. Com. 445; Mills vs. Barber, 1 Mees & W. 425.

1. The giving a note will be intended to have been given for a balance due, Defreest vs. Bloomingdale, 5 Denio 304; Lake vs. Tyson, 6 N. Y. 461; that

Life Ins. Co. vs. Brinker, 77 N. Y. 435; not that payments made by a bank are made by mistake, even when the account of the party for whom they are made is not good, Whiting et. als. vs. City Bank, 77 N. Y. 367; State vs. Radowitz, 8 Reporter 263; and the defence of mistake is an affirmative one, Meyer vs. Lathrop, 73 N. Y. 322; that a joint and several note, signed by three, with the word surety added to the end of the last, the last is *prima facie* surety for the other two, 73 N. Y. 552; that a note made by firm name, by one partner, was used in the firm business, First Nat. Bank vs. Morgan, 72 N. Y. 593; that servants in charge are servants of the R. R. Co., Thorpe vs. N. Y. C. & H. R. R. R. Co., 77 N. Y. 402; that payments made on an open running account are presumably to be applied to the extinguishment of the items in the order of their dates, Postmaster General vs. Farlen, 4 Mason 333; U. S. vs. Wardwell, 5 ib. 82; U. S. vs. Kirkpatrick, 9 Wheat. 738; Jones vs. U. S., 7 How. 681; but where the earlier items of account are secured by mortgage, and the later items unsecured, payments made after the expiration of the time for payment mentioned in the mortgage should be applied to the unsecured amount, Field vs. Holland, 6 Cranch. 8; Schuelenburg vs. Martin, 10 Reporter 230—provided, of course, no application be made by the parties.

It is presumed that a man had adopted or accepted an advantageous act, offer, gift, bequest, devise or conveyance, &c., until his positive disclaimer is shown, as, when elected a trustee of a corporation, his acceptance will be presumed—that he has adopted an advantageous act done by another as his assumed agent, Bailey vs. Culverwell, 8 Bar. & C. 448; that a widow has adopted and advantageous testamentory provision in lien of dower, Merrill vs. Emery, 10 Pick. 507; the benefits should appear clear and uneqnivocal, Russel vs. Woodward, 1d 408; because men are presumed to act according to their own interest, 1 Ves., Jr., 227; Amesburg vs. Brown, 1 Ves., Sen., 480; Forbes vs. Moffatt, 18 Ves., Jr., 384; as where the equity of redemption was devised to the mortgage, it was held that this union of estates should extinguish the mortgage, if that result would be indifferent to the devisee, otherwise if he had an interest to keep it on foot—and so of other like cases, Forbes vs. Moffat, 18 Ves. 384; Gibson vs. Crehore, 5 Pick. 146; Freeman vs. Paul, 3 Greenl. 260; Starr vs. Ellis, 6 Johns, ch. 393; Mills vs. Comstock, 5 Id. 214; *prima facie* it was an extinguishment, and the one who pays must show that his interest was to have the mortgage kept on foot Gardiner vs. Astor, 3 Johns. Ch. 53; Burnett vs. Dennistown, 5 Id. 35; Starr vs. Ellis, 6 Id. 393; James vs. Morey, 2 Cow. 246.

*21 *brought from an unsuspected repository, will be presumed to have been duly executed, so as to supersede the necessity of calling the attesting witness.(1)(*b*)

(*b*) 1 Phil. Ev. 458.

1. In ejectment, the missing link in the plaintiff's title will not be be presumed to exist, unless some act of ownership is shown for a sufficient length of time by the party to whom, in such evidence, the missing link would be presumed to have been made, Warner vs. Henby, 48 Pa. 187.

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every presumption will be made against the purchaser of an over-due note, Johnson vs. Bloodgood, 2 Cai. Cas. 303; 1 Johns. Cas. 51; that the acceptor of a bill has funds of the drawer in his hands; and in an action against the acceptor, the burden of disproving the presumption rests upon him. When the presumption is not repelled, the drawer of the bill stands in the same relation to the acceptor as the endorser of a promissory note to the maker. The acceptor is the principal debtor—the drawer his surety, merely, At. F. & M. Ins. Co. vs. Bois. 6 Duer 583, and when *bona fides*, by legal presumption or proof is established, it can be overcome only by allegation and proof of bad faith affirmatively—the purchaser for value of stolen negotiable securities will be protected, unless the circumstances are such that an inference can fairly and legitimately be drawn that the purchase was made in bad faith or with notice of defective title in the seller; to defeat his title it is not sufficient to show that a prudent man would have been put upon inquiry, or that he was negligent or did not exert a proper degree of caution, Duch. Co. Mut. Ins. Co. vs. Hatchfield, 73 N. Y. 226; City of Eliz. vs. Force, 2 Stew. 590; Carpenter vs. Rommel, 5 Phil. 34; Spooner vs. Holmes, 102 Mass. 505; if the instrument is incomplete, as if any *essential part* is in blank, and if afterwards filled up by the thief, or holder through the thief, no recovery can be had, Ledwich vs. McKim, 53 N. Y. 308; Jackson vs. Vicksburg Co., 2 Woods. 141; but the insertion of the name of a payee in blank left for that purpose, is not such an alteration as will avoid the bond, Boyd vs. Kennedy, 9 Vr. 146; Dutchess Co. Ins. Co. vs. Hatchfield, 1 Hun. (N. Y.) 673, because its negotiability is not thereby affected, Smith vs. County, 54 Mo. 58; and the sames applies to coupons, McCoy vs. Washington Co., 3 Wall. Jr., 381. But in an ordinary non-negotiable bond, an obligee is just as essential as an obligor, Pelham vs. Griggs, 4 Ark. 141; Phelps vs. Call, 7 Ired. 262; Marth vs. Brooks, 11 Ired. 409; Kemp vs. McGuigan, Tapp (O) 50. But if overdue bonds or coupons are stolen, and then come into a *bona fide* holder's hands, he cannot collect their amount, Arents vs. Com., 18 Gratt. 750; First Nat. Bank vs. Com., 14 Minn. 77; Belo vs. Forsythe, 76 N. C. 489; Vermilge vs. Adams Ex. Co., 21 Wall. 138; a blank as to date would not effect a recovery, Pierce vs. Richardson, 37 N. H. 306; Fournier vs. Cyr., 64 Me. 32; Whiting vs. Daniel, 1 Hen. & Mun. 391; Bills vs. Stanton, 69 Ill. 51; as delivery will be presumed to have beem *immediately* at the making, Peasly vs. Robins, 3 Metc. 164.

Some are founded on the ordinary conduct of mankind. Thus, if an individual goes abroad, and is not heard of for seven years, (1) his death will be presumed, because it is probable that if still in existence some news or account of him would have reached his friends, (*c*). There are a great many presumptions of mixed law and fact based on this principle.

§ 23. Sometimes a party, by his own act or conduct, raises a presumption against himself; or to speak more correctly, deprives himself of the advantage of taking a particular objection, which may in itself be well founded.(2) Thus in Wilson vs. Hobday,(*a*) which was an action of debt on a replevin bond, where the declaration stated a distress which had been made by the plaintiffs within the jurisdiction of the mayor of C., on the goods of W. H., who, having made a plaint to said mayor, the latter took the replevin bond from the defendant, on which the action was brought; and it was held by the court that as the defendant had the benefit of the replevin, and had executed the bond, it should

(*c*) Doe vs. Jesson, 6 East 85; Hopewell vs. De Pinna.

(*a*) 4 M. & S. 125; Steph. on Pl. 400.

1. The presumption of the continuance of life prevails up to the end of the seven years since last heard from by his friends, and that he died at that precise time and not sooner, Clark vs. Canfield, 15 N. J. Eq. 119; Moffet vs. Varden, 5 Cr. C. C. 658; Whitney vs. Nichols, 46 Ill. 230; and when such person is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it, Galilland vs. Martin, 3 McLean 490; Ashbury vs. Sanders, 8 Cal. 62; the presumption of death from extreme old age, even up to one hundred years is not conclusive, Burney vs. Ball, 24 Ga. 505.

The better opinion now is, there is no presumption in law of survivorship in case of persons who perish by a common disaster. One who claims through survivorship must prove it, Newell et als. vs. Nichols et. al., 75 N. Y. 79; Kans. Pac. R. R. Co. vs. Miller, 2 Col. T. 442; Smith vs. Croom, 7 Fla. 81.

2. So, if a party accept a deed with inherent covenants, he is bound, though he neither signs or seals, Shep, T. 177; and an indenture of bargain and sale purporting to be *inter partes*, by which an estate is conveyed to the grantee, if he accept the deed and the estate conveyed, although he do not sign and seal, it is just as much his deed as that of the grantor, Finley vs. Simpson, 2 Zeb. 331; Barnett vs. Lynch, 5 B. & Cr. 589.

be presumed as against him, that a custom existed for the mayor of that place to grant replevins.(1)

§ 24. In the cases we have hitherto been considering, the pleading of one only of the litigant parties had a presumption of law in favor of the truth of the facts alleged in it. It, however, sometimes happens that the pleading of each party has a legal presumption in favor of its truth ;(2) and when this is the case it becomes a question of considerable difficulty to determine which of the two conflicting presumptions is entitled to the precedence, *22 and by *being considered the strongest, casts the onus probandi on the party whose pleading is only fortified by the weaker one. Thus if a man charged with an indictable offence plead

1. Those who execute an undertaking are estopped from contradictiug its recitals to defeat the instrument, Coleman vs. Bean, 14 Abb. Pr. 38; Wayman vs. Taylor, 1 Dana 257; Bronson vs. Taylor, 33 Conn. 116; so where a written contract is relied upon in the pleadings of both parties; it does not rest with the defendants to object to its admission in evidence, Reed vs. Phelps, 5 Ill. 39, it is available as an admission without being produced, M'Gowan vs. Smith, 36 L. J. Ch. 8; Lett vs. Morris, 4 Sim. 607; so the production of the note, on the part of the plaintiff, is not necessary where it is not denied on the record, Cannan et als. Farmer, 2 C. & K. 747. An admission in the pleading estops the party making it, but an admission in one count or plea does not conclude the party upon any other count or plea, Hall vs. Clements, 41 N. H. 166; Bartlett vs. Prescott, Id. 493; Jackson vs. Bank of Marietta, 9 Leigh, 240; Nadenbousch vs. Sharer, 2 W. Va. 285; and if a written contract contain various undertakings, the plaintiff may complain of the breach of one or of all—but if he confine himself to one. he admits the performance of the others, Chinn vs. Hamilton, 1 Hemst. 438; so if secondary evidence be offered, neither party will afterwards be heard to complain.

2. (See § 5, N. 1.) If an allegation contains full and complete averments of remediable right and liability, there will be a legal and conclusive presumption in its favor until it is put in issue. If it is not denied, the presumptions of law asserts that it is sufficiently proved, Summons vs. Jenkins, 76 Ill. 482; Briggs vs. Dorr, 19 Johns. 95; Jack vs. Martin, 12 Wend, 316; Raymond vs. Wheeler, 9 Cow. 295; nor will its existence be suffered to be denied, Robbins vs. Codman, 4 E. D. Sm. 325; Page vs. Willets, 38 N. Y. 31; Ridgway vs. Longacre, 18 Pa. 215; Thatcher vs. Hunn, 12 Iowa 303; and he cannot be nonsuited where the issue is on the defendant, Newhall vs. Holt, 6 M. & W. 662, if the plaintiff appear; Symes vs. Larby, 2 C. & P. 258.

insanity at the time of its commission, although here the law would *prima facie* presume his innocence of the offence charged, yet, on the other hand, as it always presumes sanity of mind in every individual till the contrary be shown, here is a case where two presumptions conflict. The latter, however, preponderates, and it clearly lies on the party accused to make out the fact of insanity, because the presumption against him is one founded on the ordinary and established course of nature; whereas the presumption of innocence, although a just and proper one, is a mere creature, and, in many instances, a mere fiction of law.(1)

§ 25. Again, where a female had been married about seven years; and a few months after the marriage her husband enlisted as a soldier, went abroad on foreign service, and had never since been heard of; and she, about twelve months after his departure, married another person by whom she had issue: it was held by the Court of King's Bench, on a case reserved from the sessions, that the issue were to be deemed legitimate;(2) for, although the

1. Proof beyond a reasonable doubt is *necessary* to establish a fact against a prisoner, and preponderating proof is sufficient to establish a fact in his favor, Peop. vs. Melgate, 5 Cal. 127; Warden vs. State, 18 Ga. 264; and *preponderance* of evidence is sufficient to establish the defence of insanity, State vs. Redemeier, Mo., 1880, 10 Reporter 272. So it will be seen that the presumption of innocence is not a mere "fiction of law." Proof beyond reasonable doubt is the language of the courts. But this does not mean that preponderance only of testimony is required. Presumptions, also, must be taken into view. The evidence of guilt must preponderate over both the testimony to and the presumption of innocence, Jones vs. Greaves, 26 Oh. State 2; Burr vs. Wilson, 22 Minn 206; Werton vs. Gravlin, 49 Vt. 507.

2. It is submitted this is not the law. The question of the bigamous guilt or innocence was not directly involved, but a civil issue of legitimacy of the issue of the second marriage. The issue of the second marriage might be illegimate, and the mother referred to in the text not be guilty of bigamy. The court say, in Squire vs. State, 46 Ind. 459, that "it is proper to charge the jury that if they believe, from the evidence, that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe and did believe, at the time of his second marriage, that his former wife had been divorced from him, then they should find for the defendant." As to the presump-

law will in general presume that a party once proved to have been alive continues so until seven years elapse without any account from him,(1) yet where the consequence of making that presumption would be to presume another person guilty of felony, (viz., bigamy, as in this case,) the law will presume his death to have taken place sooner; and that as the presumption of the duration of life clashed with that general presumption of innocence, to the benefit of which every one is entitled, the former

1. Chancellor Green, in Clark vs. Canfield, 2 McCarter (N. J.) 119, cited *supra*, seems to present the law: "The real question is not whether the statue presents any evidence of the precise time of death, but whether it furnishes any evidence of the occurrence of death before the end of the seven years. If it does not, the presumption of life continues, by well-settled rules of evidence, independent of the statute. The presumption of death, which arises upon the expiration of the seventh year, cannot operate retrospectively, Whitney vs. Nichols, 46 Ill. 230; and when such person is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it, Galilland vs. Martin, 3 McLean 490; Asbury vs. Sanders, 8 Cal. 62. The presumption of death from extreme old age, even up to one hundred years, is not conclusive, Burney vs. Ball, 24 Ga. 505.

The better opinion now is, there is no presumption in law of survivorship in case of persons who perish by a common disaster. One who claims through survivorship must prove it, Newell et als. vs. Nichols et al., 75 N. Y. 79; Kans. Pac. R. R. Co. vs. Miller, 2 Col. T. 442; Smith vs. Croom, 7 Fla. 81.

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tion of legitimacy and the presumption of the continuance of life up to the end of the seven years of absence and unheard of, the court say, in Murry vs. Murry, 6 Oreg. 17: "Where a husband had been absent for three years, and information was received by his wife that he was dead, and she thereafter married again, before the expiration of seven years from his departure—*held*, in a suit involving the legitimacy of her children by the second marriage, that the question of her being at liberty to make the second marriage was not governed by the presumption of *innocence*, but was to be determined by the jury in view of all the circumstances." And the court say, in Squire vs. State, *supra*: "In a prosecution for bigamy, the State must prove, *beyond a reasonable doubt*, that the first wife was living at the time of the second marriage. Where there is no direct evidence on this point, and the only evidence is that the first wife was alive two years previous to the second marriage, the presumption of the continuance of her life is neutralized by the presumption of the innocence of the defendant, and in such case there can be no conviction"

should, in the present case at least, give way.(*a*) The subject, *23 however, *of conflicting presumption is far too extensive to be discussed in a treatise like the present; and we shall accordingly here dismiss it, by observing that the rules on the subject seem to be that special presumptions take precedence of general ones; that presumptions deduced from the ordinary course of nature are stronger than such as are merely artificial; that presumptions which make in favor of a party accused, are more favored than such as make against him; and, lastly, the presumptions which tend to give validity to acts of parties and instruments, are more favorably regarded than such as tend to annul or destroy them.(1)

§ 26. Leaving, therefore, the subject of presumption, we proceed, lastly, to consider the third branch of our general rule. Whether the question at issue be one, both the affirmative and negative of which are, in contemplation of law, equally probable, or whether either side be strengthened by a presumption in its favor, still the relative positions of the parties as to the capability

(*a*) R. vs. The Inhabitants of Twyning, 2 B. & Ald. 386; *vide*, also, on this subject, Doe d. Knight vs. Napean, 5 B. & Ad. 86.

1. A presumption sufficient to shift the burden of proof may arise from the known principles of human conduct, and the ordinary and reasonable course of transactions among men. Snevely vs. Jones, 9 Watts 433; Crist & Haldeman Brindle's Ex'rs, 2 Pa. 251, 262.

An account handed or sent to a merchant who keeps it, without any objection being made for a long time, is presumed to be correct; and there is no reason why the same should not apply to other places, between whom are accounts current or accounts in the ordinary course of business, Shepherd vs. Bank of Missouri, 15 Mo. 114; Freeland vs. Heron 7, Cranch 147; Webb vs. Chambers 3, Ired. (N. C.) L. 374; contra, Robertson vs. Wright, 17 Gratt 534.

The law does not presume from the simple fact of one man's handing money over to another, that the transaction is *prima facie* a loan, Garding vs. Walter 29, Mo. 426.

There is no such legal presumption that money advanced by a widowed mother to her child is intended as a gift, and not a loan, as there is in case of a father; as there is no such legal obligation upon her to maintain and provide for her children, the question is one of evidence in each case, Bennett vs. Bennett, Chan. Div. 40, L. T. R. N. S. 378.

of giving evidence about it may be materially different. The question may be one of such a character as from its very nature almost all the evidence which could be adduced on the subject must lie in the possession of one of the parties, who could, without any inconvenience to himself, put an end to litigation at once by producing that evidence, while to call on the other party to establish his case on the ground that the affirmative lay on him, or that there was a presumption of law against his pleading, would not only be unjust, as placing unnecessary difficulties in his way, but be productive of circuity and delay in judicial proceedings. The law has wisely taken means to prevent this species of practical mischief, by laying down as a principle, "that when the case of a party lies in the proof of some particular fact, *24 of the truth or falsehood *of which he must, from its very nature, be peculiarly cognizant, the onus of proving that fact lies upon him.(*a*)

§ 27. This rule is of very general application; it holds good whether the proof of the fact in issue involve the proof of an affirmative or of a negative, and even though there be a presumption of law in favor of the party pleading the specific fact.(1) Thus in Borthwick vs. Carruthers,(*b*) which was an action of assumpsit, to which defendant pleaded infancy, and the plaintiff replied that "the defendant, after attaining his full age, confirmed the promise," it was held that, after a promise to pay had been proved by the plaintiff, it lay on the defendant to prove the fact of infancy, which made him incapable of contracting, as this was a fact peculiarly within his own knowledge.(1) Coverture, it

(*a*) Dickson vs. Evans, 6 T. R. 57; per Ashurst, J., 1 Phil. Ev. 188; 1 Stark. Ev. 378; Ev. Poth. 145.

(*b*) 1 T. R. 648.

1. This proposition is unsound, and cannot be maintained on principle or by reference to the cases. The case in the text, Bostwick vs. Carruthers, is affirmed in Bigelow et als. vs. Gramis, 4 Hill 206, and Stewart vs. Ashley, 34 Mich. 183; but these cases are not put on the ground that convenience of proof by the defendant necessitated his producing it. The plaintiff's replied *that after defendant had arrived at the age of twenty-one years, to wit, at such a time, confirmed, &c., said promise.* When the plaintiff proved the new promise, confirmation, &c., he proved his whole replication in law; for the law presumes all

would also seem, from the case of Lacon vs Higgins,(*a*) *infra*, p. 34, is another fact of the same description, which is to be proved by the party who pleads it. In an action against a person for practicing as an apothecary without a certificate,(1) it was held that it lay on the defendant to prove that he had a certificate.(*b*)

(*a*) 3 Stark. 167. (*b*) Apothecaries' Co. vs. Bently, R. & M. 159.

1. Alderson, B, in Elkin vs. Janson, 13 M. & W. 662, in referring to the Apoth. Co. vs. Benthy, in the text. says: "If you will look at the Apothecaries'

promises are made by competent persons till the contrary is shown, and the presumption does not go to competency generally, but will uphold a contract on the presumption of majority at any specified time necessary to support it. The presumption of majority, added to the proof of confirmation or new promise, makes complete proof for the plaintiff; for the presumption of a fact in a party's favor is sufficient proof, Ross vs. Hunter, 4 T. R. 33; Calder vs. Rutherford, 3 B. & B. 302.

The whole doctrine of imposing the proof upon the party who must be peculiarly cognizant of the facts, is not in harmony with principle. The party must produce proof whenever the law imposes the burden upon him, and if the fact be *prima facie*, and presumptively in his favor, he is relieved from farther proof. The burden is then on the party who is compelled to suffer judgment or free himself from liability, Great West. R. R. Co. vs. Bacon, 30 Ill. 347; 1 Gall. 104, 150, 188; Rex. vs. Pemberton, 2 Burr. 10, 37; Rex. vs. Jarvis, 1 Burr. 148; 1 East: Bliss vs. Bramard, 41 N. H. 256; Solomon vs. Dreschler, 4 Minn., 278; Horan vs. Weiler, 41 Pa. 470; Toledo, &c., R. R. Co. vs. Pence, 68 Ill. 254.

Alderson, B., in Elkin vs. Janson, 13 M. & W. 662, in remarking upon the language of Bayley, in the case of Rex. vs. Turner, 5 Man. & Sel. 206, ("that I have always understood it to be a general rule that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it,") says: "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of evidence, but there should be some evidence to start it in order to cast the burden on the other side."

So it is held in the principal case of Elkin vs. Janson, *supra*, that in an action on a marine policy, the law implies sea-worthiness of a ship—that the communication of all facts material to the risk was made by the assured to the underwriter, and if there be a defence on the non-communication of such facts, the burden is on the defendant to give some testimony to change the burden, though they be negative. So it is now held that when the right of action is founded on a negative obligation, the burden of proving the negative is upon the plaintiff, Algie vs. Wood, 11 J. & Spr. 46; Noe vs. Gregory, 7 Daly 273. See § 4, *ante*, and Doe d. Bridges vs. Whitehead, 8 Ad. & El. 571.

§ 28. And in Dickson vs. Evans,(*a*) which was an action by the assignees of a bankrupt, where the defendant gave notice of a set-off, and gave in evidence some promissory notes which were dated before the bankruptcy, it was held that it lay on him to show that they came to his hands before that time.(1) And in actions for penalties on the game laws, for sporting without qualification, it is held that it lies on the defendant to show his qualification, and not on the plaintiff to disprove it.(*b*) The same rule is also followed in criminal proceedings. On informations *25 before magistrates for *similar violations of the game laws, it is sufficient that the qualifications required by the statutes be severally negatived in the information, without stating evidence

(*a*) 6 T. R. 57. (*b*) 1 Phil. Ev. 188.

1. One who alleges that before the payment of a judgment the judgment debtor had notice of the assignment thereof, must take the burden of proving it if it be denied, Burrell vs. Tedmarsh, 1 Ill. App. 571.

Act, Geo. III, c. 194, s. 21, you will find the words seem to require that he shall prove it," and the court, in Doe d. Bridges vs. Whitehead, *supra*, say, " the burden of proof in the above instances lies on the defendant—not because the matter is peculiarly within his knowledge, for that cannot vary the rule of law, but because the legislature has, in those cases, by general prohibition, made the act of the defendant *prima facie* unlawful." The language of the court, in Sheldon vs. Clark, 1 Johns. 514, is : " The averment that the defendant practiced physic contrary to the statute is sufficient; and it was incumbent on the defendant, by his plea, to have brought himself within some proviso of the act. As he has not done so, either by pleading or evidence, we are of the opinion that judgment ought to be affirmed." So, in a *qui tam* action to recover a statute penalty for marrying minors without the consent of their parents or guardians, the burden is on the defendant to show such consent, Wedlock vs. Brown, 4 Mo. 870,—and it is not necessary for a creditor to prove that a debt evidenced by a lost paper is not paid ; the onus is on him who alleges payment, Bell vs. Young, 1 Grant (Pa.) 175 ; McGregory vs. Prescot, 5 Cush. 67. And in an action on a common money bond, the plaintiff need not show that the bond is forfeited ; it rests on the defendant to prove payment, Penny vs. Foy, 8 B. & C. 11. And instead of defendant's proving because the facts are peculiarly within his knowledge, the plaintiff alleges these negatives and defendant proves license consent, payment, &c., because the law supplies the proof for the plaintiff by presuming against infancy, consent, license, payment, &c. The law determines by presumption what is a *prima facie* case.

to negative them. "If," says Mr. Phillips p. 188, "such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict, in consequence of the great number of distinct heads of qualification which are enumerated in the statute. On the other hand, all the qualifications specified are peculiarly within the knowledge of the qualified person, but the prosecutor has probably no means of proving a disqualification."

§ 29. Again, in a case where a party was convicted of selling ale without license, and the only evidence given was that the party sold ale, the court held that the conviction was right. And per Abbott, C. J.: "The party thus called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case is taken the other way, the informer is put to considerable inconvenience."(*a*) And, lastly, where a carrier was convicted under 5 Ann., c. 14, for having game in his possession, it was held sufficient that the qualifications required were negatived in the information, and that it was not necessary to negative them in evidence.(*b*) It will be remarked that in several of these cases the party who was called on to prove the specific fact in question had the general presumption of innocence in his favor, which, however, was insufficient to exempt him from the operation of the rule under consideration.(1)

(*a*) Harrison's Case, Rosc. Crim. Ev. 57. (*b*) R. vs. Truner, 5 M. & S. 206.

1. "*The party who was called on to prove the specific fact in question, had the general presumption of innocence in his favor.*" The presumption applies in these actions, not to the establishment of the substantive fact of license, authority, &c., but to the criminative facts of selling liquor, &c., or any other facts or acts requiring a license to justify. These statutes make the acts of selling liquor, hunting, having game in possession, &c., unlawful and injurious to the public at large. The criminal acts are made so by law, independent of license. The presumption of innocence goes to rebut evidence of the criminative acts. The question of license or authority is special justification, and there is no more presumption of the existence of justifying affirmatives than of criminal or culpable affirmatives—except that the defendant's justification may be established by

§ 30. Having now gone through the several branches of the general rule given at the commencement of this chapter, and shown the various principles by which the burthen of proof is *26 regulated, we will now, previous to its conclusion, *recapitulate, and present them all at one view to the eye of the reader:

There are, in all, six rules.

1. Generally, the burthen of proof lies on the party who asserts the affirmative on the record.

2. The affirmative on the record means the affirmative in *substance*, and not the affirmative in *form*.

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preponderance only, while the criminal affirmation must overcome the legal presumption of innocence and the defensive and justifying facts both. The question, then, as to the burden, must be determined in these cases: 1. Is the doing of the affirmative acts made unlawful by law? If they are, this is all the State or plaintiff need prove. 2. If they are not, the State or plaintiff must prove all the facts necessary to constitute culpability or crime, even though it be an inconvenient negative. The cases have developed a rule of some convenience and generality—"That where there is an exception in the enacting clause of a statute, it must negative the exception; but, on the other hand, if there be an exception in the *proviso* thereto, or in a subsequent section of the act, it is matter of defence and must be set up by the defendant," Atty. Grubb vs. Oakland Co. R. R., Walk. (Mich.) 90; Great W. R. R. Co. vs. Hanks, 36 Ill. 281; Lynch vs. Peop., 16 Mich. 472; Faribault vs. Hulet, 10 Minn. 30; Clough vs. Shepherd, 31 N. H. 490; Gould vs. Kelly, 16 id. 551; Mills vs. Kennedy, 1 Bailey 17; McGlorn vs. Prosser, 21 Wis. 273; U. S. vs. Hayward, 2 Gall. —; and the rule obtains with more strictness in indictments, Brittain vs. State, 10 Ark. 299; U. S. vs. McCormick, 1 Cr. C. C. 591; Mathews vs. State, 24 Ark. 484; State vs. Miller, 24 Conn. 522; State vs. Powers, 25 id. 48; Elkins vs. State, 13 Ga. 435; Cook vs. State, 26 id. 593; Metzker vs. People, 14 Ill. 101; Colson vs. State, 7 Blackf. 590; Bonser vs. State, 1 Ind. 408; Schneider vs. State, 8 id. 410; State vs. Bruike, 9 Iowa, 203; Byrne vs. State, 12 Wis. 519; State vs. Williams, 20 Iowa 98; Com. vs. McClannahan, 2 Metc. 8; State vs. Godfrey, 24 Me. 232; State vs. Garney, 37 Me. 149; State vs. Shiflet, 20 Mo. 415; Com. vs. Maxwell, 2 Pick. 133; Com. vs. Fitchburg R. R. Co., 10 Allen 189; State vs. Cox, 32 Mo. 566; State vs. Abbott, 31 N. H. 434; State vs. Wade, 34 id. 495; Staughin vs. State, 17 Ohio St. 453; Werley vs. State, 11 Humph. 172; Com. vs. Hill, 5 Gratt. 682.

Crompton, J., in Apoth. Hall vs. Calvert, 6 Irish L. R. 194, says: "The alle-

3. If there be a presumption of law in favor of the pleading of either party, the onus probandi is cast upon his adversary, even though he may thereby be called on to prove a negative.

4. When there are conflicting presumptions, the onus probandi lies on the party who has in his favor the weakest presumption of the two.

5. If the case of a party lies on the proof of some particular fact, of the truth or falsehood of which he must, from its very nature, be peculiarly cognizant, the onus of proving that fact lies on him.

6. And this last rule holds, even though there be a presumption of law in favor of his pleading.

To aid in the application of these, may be subjoined the two tests already mentioned in this chapter. First, to conceive the affirmative and negative allegations on which the issue has been

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gation in this case is that the defendant practiced the art and mystery of an apothecary, and opened a shop as such. [The objection was that the declaration did not allege any specific instance of the time and persons with whom he practiced, &c.] Let us see whether there is any distinction between this case and that class of cases to which it has been compared. Confessedly, in an indictment for obtaining money under false pretences, it is necessary to state the instances. I think there is a distinction between cases where the offence is a general offence —an offence against the public, not against an individual—and the cases where the offence is particularly and especially against an individual. No man can be indicted generally for obtaining money under false pretences—he must be indicted for obtaining money under false pretences from a particular individual. No man can be indicted generally for robbery, but he must be indicted for robbing some particular individual. In an indictment for obtaining money under false pretences, it is not sufficient to state that the party obtained money under false pretences, because the *corpus delicti* is obtaining money under false pretences from a particular individual; so, in an indictment for robbery, the *corpus delicti* is not general robbery, but robbery of a particular individual. This species of *qui tam* action, to a certain extent, bears an analogy to those cases of indictments where the *corpus delicti* is doing a thing injurious to the public. In those cases the general form is sufficient, and for this reason—that the *corpus delicti* is an offence against the public. But this case has no analogy to those cases where the *corpus delicti* is an offence against a particular individual, for the offence here is an offence against the public."

joined both struck out of the record, and then consider which party would be entitled to succeed, as the onus probandi will lie on his adversary.(*a*) Second, to consider which party would be entitled to succeed if no evidence at all were given on either side, as the onus probandi must lie on the opposite party.

(*a*) *Supra* p. 18, n.

CHAPTER II.

OF THE RIGHT TO BEGIN.

§ 31. Having, in the preceding chapter, considered the doctrine of the onus probandi, or burden of proof generally, we proceed, in the present one, to show its application in one very important respect, viz., as affecting the order (1) in which the cases of the

1. It seems to be the English practice for the junior counsel for the plaintiff to open the pleadings, and shortly state the substance of them to the court. The right to begin is then settled, Chitty's Arch. Pr. 365; Roscoe's N. P. 274; Best Ev., § 631; Woodgate vs. Potts, 2 Car. & Kir. 458.

Only one counsel on each side is to be heard on the right to begin, and the counsel for the defendant has the right to reply, Rawlins vs. Desborough, 2 M. & Rob. 70; and the party adjudged to hold the affirmative, and consequently to begin, will be expected to observe the rule generally adopted in this country to require a strict opening on the part of the plaintiff and defendant—a summing up by one of the plaintiff's counsel, then by all the defendant's counsel and then a closing by the plaintiff's counsel, Blight vs. Ashley et als., 1 Pet. C. C. 29; and when the defendant entitles himself to the opening upon an affirmative plea, the rule applies by regarding him the plaintiff. See rule laid down by Justice Washington, 3 Cir. Pa., Vuyton vs. Brenell, 1 Wash. C. C. 467.

The party beginning will be expected to state, briefly—1st, the nature of the action; 2d, the substance of the pleadings; 3d, the points in issue; 4th, the facts and circumstance of the case—the substance of the evidence to be adduced in its support; and, 5th, state the nature of the defence, if it appears on the record, but no further, Ayrault vs. Chamberlain, 33 Barb. 233. The rule now is, not to allow an opening in regard to the defence, except in an incidental way, but to wait and see whether the anticipated defence will, in fact, be attempted to be proved, Morris vs. Wadsworth, 17 Wend. 118; Ayrault vs. Chamberlain, *supra*. The counsel for the defendant, in opening his defence, will be confined to a statement of his answer to the plaintiff's case and the evidence he proposes to give to sustain it, and in such opening he should not comment, in the way of summing up upon the plaintiff's evidence, any further than is essential to the proper understanding by the jury of defendant's evidence, State vs. Zellers, 2

respective litigant parties should be presented to the jury, or, as it is commonly called, the right to begin; while in the next shall be considered the subject of the right to reply, which is

Halst. (N. J.) 220; Dodge vs. Dunham, 41 Ind. 188; Bedell vs. Powell, 13 Barb. 184, See Right to Reply, chap. 33, *infra.*

In opening, the party should lay the foundation to exhaust all his testimony in support of the issue on his side before closing, and can thereafter introduce evidence only in reply, Marshall et als. vs. Davies, 78 N. Y. 419; Hastings vs. Palmer, 20 Wend. 225; Ford vs. Niles, 1 Hill 301; Rex vs. Stimpson, 2 Carr. & P. 415.

Evidence in reply, or rebutting evidence, must be considered in reference to two conditions of the opposite party's testimony. First, such as rebut the opposite party's testimony by simply negativing the *prima facie* case assumed to have been made out, and, second, such as tends to deny or avoid some *affirmative* fact which the answering party has endeavored to prove.

As to the former, whatever is a confirmation of the original case cannot be given as evidence in reply, and the only proper evidence is such as goes to cut down and negative the case, and contradict the witnesses on the opposite side, and corroborate those of the party who began, Marshall et al. vs. Davies, *supra*; Silverman vs. Foreman, 3 E. D. Sm. 322; Rex vs. Stimpson, *supra.* So in a criminal prosecution, where the defence was *alibi*, evidence in reply that the prisoner was seen near the place, &c., was rejected, Rex vs. Hilditch et al., 5 Car. & P. 299.

And where the counsel for the Crown, having, by direction of the court, called witnesses, whose names appeared on the back of an indictment, and had them sworn to give the prisoner's counsel a chance of cross-examination, but not examining them in chief, the prisoner's counsel having accordingly cross-examined—*held*, that after this the counsel for the Crown could not examine them in chief, but only by way of re-examination, and therefore must confine himself to what arose out of the cross-examination, Rex vs. Beezly, 4 Car. & P. 218.

Corroborating witnesses in the reply means any relevant contraction whose introduction would have been improper or uncalled for, when the case was with the party introducing it, Marshall et al. vs. Davies, *supra*; and the testimony must, in direct and express terms, meet and negative defendant's proofs, and not inferentially either confirm the plaintiff's case made or destroy the effect of the defendant's. As in Knapp et al. vs. Haskall, 4 Car. & P. 590. Assumpsit to recover the amount of a builder's bill for building houses—plea, general issue. For plaintiffs, evidence was given that the work was done and the charges reasonable.

consequent to and depending upon it.(a) We say in one very important respect; for this is by no means the only instance in which the doctrine of the onus probandi can be applied in prac-

(a) Buzzell vs. Snell, 25 N. H. 474; Belknap vs. Wendell, 21 id. 175; Chesley vs. Chesley, 37 id. 229; Huntington vs. Conkey, 33 Barb. 218; Lex, &c., Ins. Co. vs. Paver, 16 Ohio 324.

The defence was that the charges were too high, and that the defendant had paid money to the plaintiff sufficient to cover what the amount ought to have been. For the defendant several surveyors were called, who stated that they had surveyed the houses in the year 1831, and that they considered the amount of the charges to be £100 too high. F. Pollock, for the plaintiff, wished to put in as evidence in reply, a letter from the defendant's attorney to the plaintiff, stating that the defendant had had a survey of the promises in the year 1829, and that his surveyor thought the charges £60 too much.

Sir J. Scarlett, *contra*: "This is not evidence in reply; it does not contradict my case: it does not show that, in the year 1831, the value is not what my witnesses have stated; nor does it show that they never made any valuation."

F. Pollock: "The defendant sets up this valuation as a fair one. Now, it is competent for me to show that it is not so; for in the year 1829 the defendant was setting up a different valuation."

Sir J. Scarlett: "Suppose I had had more surveyors here, I need not have called them. If my friend had had twenty witnesses in attendance to prove any fact, he would select those that would best prove his case, and not call the others; and if he had meant to have relied on this letter, he should have put it in as part of his original case."

Lord Tenderden, C. J.: "I am of opinion that this is not proper evidence in reply." The evidence was rejected.

As to the latter, the denying or avoiding of affirmative facts introduced by the opposite party, the following is an illustration. On a prosecution for larceny, which was sustained in the first instance merely by the prisoner's possession of the stolen goods, [*quære*—if simple possession would authorize a conviction, see § 11, *ante*,] the latter proved by his daughter that he bought the goods of T. The prosecutor then called T. for the first time, but was restrained from inquiring of him any further than to negative the sale, for he was a witness in reply. On asking him whether he did not see the prisoner steal the goods, the inquiry was stopped, as T. was not called in chief, and in the first instance, as he should have been, to warrant his giving evidence in chief. Being a witness in reply, he could only be received so far as his testimony went to destroy the case set up by the prisoner, Rex. vs. Stimpson, 2 Carr. & P. 415. See Leland vs. Bennett, 5 Hill 288; Ford vs. Niles, 1 id. 300. So it will be seen that under the general rule that parties shall respectively introduce all the testimony on their affirmatives together,

tice. After the case is opened and gone into, it often becomes a serious question for the court to determine, by means of those general rules by which the burden of proof is regulated, and by the presumptions (1) to which allusions have been made in the last chapter, in what manner the jury should be directed when the entire case is to be laid before them for their verdict; and the jury themselves are expected at all times to form their decisions on those sound rules of probability and principles of natural reason which have been, from their obvious justice and convenience, embodied into our jurisprudence.(2) So that we are here only called upon to consider the onus probandi as affecting the right to begin, and not in the full extent of its operation.

§ 32. The having the right to begin, and state his case first to the jury, being sometimes of great advantage to a litigant *28 *party, and at others quite the reverse, it is a great perfection in an advocate to be able to see at once, from the nature of the facts he has to deal with, whether it would be advantageous for his client to have the right to begin cast upon him or not, and accordingly struggle to obtain that right or transfer it to his adversary, as circumstances require.(*a*) It is an advantageous right when a party has a good case and strong evidence to support it, as it generally (and certainly if opposite side produce witnesses) confers a right to reply on the opener,(*b*) and thus

(*a*) See § 5, n. 1, *supra*. (*b*) See p. 30, n. 1 to § 10.

1. Presumption of law makes a *prima facie* case, § 3, n. 1; and a ruling which deprives a party of the benefit of such *prima facie* case is error, p. 16, n. 1 of § 5.

2. The power of the jury is not a power of the will, merely; it is a power involving judgment and discretion, and must be, in a reasonable degree, subject to those restraints which judgment and discretion imply, Duz. vs. Duz. 14 B. Mon. 481.

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the rule includes all circumstantial testimony which, by inference, is expected to confirm or aid an affirmative case or defence. But a party is only bound to make out his case as he has alleged it in his pleadings, Mann. vs. Eckford, 15 Wend. 502, and he can neither be permitted or required to go beyond the issue joined, Gardiner vs. Gardiner, 11 Johns 47; Ford vs. Niles, *supra*; Morris vs. Wadsworth, 11 Wend. 100; Shepard vs. Potter, 4 Hill 203.

gives the last word. But, on the other hand, if the case which a party has be a weak one; if, to support it, he has only slight evidence to adduce, or perhaps none at all, but goes to trial on the chance (if defendant) of being able to nonsuit the plaintiff,(1) or that the case of the opposite party may break down through its own intrinsic weakness, or trusts to the speech of his counsel to destroy, in the minds of the jury, the effect of the adversary's evidence; then the decision of the judge, that he was the party entitled to begin, might prove fatal instantly to his cause, as it was in the late case of Edwards vs. Jones.(*a*) That was an action

(*a*) 7 C. & P. 633.

1. The defendant generally demurs to the evidence, or makes a motion in the nature of a demurrer to the evidence. The demurrer must admit the facts, not merely the evidence tending to prove them, Dormady vs. State Bank, 3 Ill. 236; Waul vs. Kirkman, 27 Miss. 283; Fowle vs. The Com. Coun. of Alexandra, 11 Wheat. 323, and the case made by the demurrer is in many respects like a special verdict (Id.), and the judgment of the court on the demurrer stands in the place of a verdict, and the defendant may take advantage of any defects in the declaration by motion in arrest of judgment or by writ of error, U. S. Bank vs. Smith, 11 Wheat. 171. It is a matter of discretion with the court whether it will compel a party to join in a demurrer to the evidence; and it ought not to be allowed where the party demurring refuses to admit the facts which the other side attempts to prove, nor where he offers contradictory evidence or attempts to establish contradictory propositions, Young vs. Black, 7 Cr. 565; Maus vs. Montgomery, 11 Serg. & R. 325; Brandon vs. Huntsville Bank, 1 Stew. (Ala.) 320; Patty vs. Edline, 1 Cr. C. C. 60; Jordan vs. Sawyer, 1 Id. 372; Morrison vs. McKinnon, 12 Fla. 552; Dormandy vs. St. Bank, 3 Ill. 236; Jones vs. Ireland, 4 Iowa 63; and in general the party who demurs is held to admit every fact which a jury in the exercise of a fair and reasonable discretion could infer from the evidence; but he is not bound to admit forced and violent inferences, U. S. vs. Williams, Ware. 175; Jones vs. Vanzant, 2 McLean 596; Copeland vs. New Eng. Ins. Co., 22 Pick. 135; Jacob vs. U. S., 1 Brock. 520; People vs. Roe, 1 Hill 470; Doe vs. Rin, 4 Blackf. 263; Hausbord vs. Thorne, 2 Leigh. 147; Clopton vs. Morris, 6 Id. 278; Ryan vs. State, 25 Ala. 65; Higgs vs. Shehu, 4 Fla. 382; Middleton vs. Com., 1 Litt. (Ky.) 347; Dickey vs. Schreider, 3 Serg. & R. 413; Tucker vs. Biting, 32 Pa. 428; Booth vs. Colton, 13 Tex. 359; Tutt vs. Slaughter, 5 Gratt. 464; Forbes vs. Church, 3 Johns Cas. 159; Vaughn vs. Eason 4 Yeates 54; Johnson vs. U. S., 5 Mass. 425; Franks vs. State, 1 Greene 541; Feay vs. Decamp, 15 Serg. & 227; Davis vs. Steimer, 14 Pa. 275; Bradbury vs. Reed, 23 Tex. 258.

of assumpsit by the indorsee of a promissory note against the maker, to which the defendant pleaded a long plea, amounting in substance to want of consideration for the note; to a portion of which the plaintiff replied that there had been a good consideration given, and to the rest entered a *nolle prosequi*. Counsel for the plaintiff said he believed the defendant should begin, which was ruled accordingly by Alderson, B., on which defendant's counsel admitted that he had no witnesses; and the judge immediately directed the jury to find a verdict against him; whereas, had the plaintiff begun, the result might have been very different.(1)

1. In Milliard et. als. vs. Thorne, 56 N. Y. 405, the complainants alleged, in substance, that they were partners, and that they sold and delivered certain goods, &c. Defendant T., who alone appeared and defended, denied the allegation of the partnership, but admitted that defendants purchased of plaintiffs the goods set forth in the complaint. The answer then set up an affirmative defense—*held*, that the denial of plaintiff's partnership was immaterial, as, if the affirmative defence failed, they were entitled to judgment whether they were partners or not; that the defendant had the affirmative and the right to open and close the proof, the denial of which was error. Citing Lindsley vs. the En. Pet. Co. 3 Lans. 176; Elwell vs. Chamberlain, 31 N. Y. 641.

This case shows that immaterial issues will be disregarded in considering the right to begin, and the material issues given the same effect as if the immaterial did not exist. The denial that plaintiffs were partners was pregnant with the admission of a right to join in an action if they could join at all without being partners; but the law says partnership is immaterial if the cause of action be joint, Wood vs. Fithian, 24 N. J. L. 33, and the law is satisfied if the actual parties to the contract are joined whether partners or not, Law. vs. Cross, 1 Black 533; and an admission by defendant that he bought goods of plaintiffs is an admission that plaintiffs dealt jointly, because of the well-settled presumption in favor of joint contracts, Chitty's Cont. 81; Mody vs. Sewell, 14 Me. 295; Sines vs. Tyre, 3 Brev. (S. C.) 249.

There should be a denial of the right to sue jointly by the general issue, Snell vs. DeLand, 43 Ill. 323; Harlem vs. Emort, 41 Id. 320; Ulmer vs. Cunningham, 2 Me. 117; Waldsworth vs. Waldsworth, 20 Id. 156; Glover vs. Moneywell, 6 Pick 222; Robinson vs. Scall, 3 N. J. L. 817; Scott vs. Patterson, 1 A. K. Marsh; 441; or plea, as in suit by the holders of a negotiable note, the denial of the right of the holders to sue puts them on proof, and thereby entitles them to open and conclude the argument, Loggins vs. Buck, 33 Tex. 113.

§ 33. These observations may suffice to show the practical
*29 *importance of the subject under consideration, and which we will accordingly enter upon without further preface.

The rule regulating the right to begin is sometimes expressed thus: that the party who asserts the affirmative of the issue has a right to begin.(*a*) It has been thus enunciated through mere

(*a*) See § 5, n. 2, p. 18. Litt. R. 36; 3 Car. & K. 1; Yeates vs. Yeates, 1 C. & P. 323; Fowler vs. Coster, M. & M. 241; 3 C. & P. 463; Williams vs. Thomas, 4 C. & P. 234; Lewis vs. Wells, 7 C. & P. 221; Davidson vs. Henop, 1 Cr. C. Ct. 280; Dunlop vs. Peter, id. 403; Beal vs. Newton, id. 404; Henderson vs. Casteel, 3 id. 365; Mason vs. Croom, 24 Ga. 211; Kimball vs. Adair, 2 Blackf. 320; Waller vs. Morgan, 18 B. Mon. 136; Judge vs. Stone, 44 N. H. 593; List vs. Cortepeter, 26 Ind. 27; Harvey vs. Elithorpe, 26 Ill. 418; Tipton vs. Triplett, 1 Metc. (Ky.) 570.

In Branford vs. Freeman, 14 Jur. 987, the defendant was ruled to begin. He began—introduced a single witness, which seems to have been all the testimony, and the plaintiff had a verdict. Defendant moved for a new trial. In the argument, Anderson, B., interposed and said: "When I ruled that you must begin, ought you not to have stood on your right by refusing to adduce any evidence? You would then have compelled me to direct the jury, and if I put the wrong point to them you would be entitled to a new trial; instead of that, you called a witness who proved the case against you." New trial refused because no injury appears to have been done. This ruling is unsound. The plaintiff's case stood proved from the very force of the ruling that the defendant should begin. And by cases cited, p. 16, in n. 1 §§ 5, 10, the defendant lost nothing by an effectual attempt to make a case under the ruling. The error consists in requiring a party, as matter of law, to prove a case already proved. The language of the court, in Heinemann vs. Heard, et. als., 62 N. Y. 456: "The question as to which party has the affirmative of the issue is in many cases very material, as the case might be one in which the jury might hesitate in finding that the plaintiff had established the charge, and yet when they would not find that it had been satisfactorily answered."

The complications arising from proving too much—*i. e.*, one party proving the case of the other instead of his own—must be solved in connection with the pleadings. In Paige vs. Willet, 38 N. Y. 31, the court say: "A mere denial in an answer will not allow a defendant to insist upon a fact brought out by the plaintiff's evidence; although, if the matter had been set up by way of defence, it would have availed to defeat the action, Brazil vs. Isham, 2 N. Y. 9." And generally, when defendant pleads a good plea, specially, he will prevail, though the proof of it appears from the plaintiff's testimony, as in Allen vs. Carey, 7 El. & Bl. 463; 3 Jur. N. S. 1146; so a substantial defect in a declaration may be supplied by admissions in the plea, Watkins vs. Gregory, 6 Blackf. 133; Robbins vs. Codman, 4 E. D. Sm. 325.

inadvertence, for although this may be true as a general principle, it is very far from possessing that universality and precision of which the subject is susceptible. Generally speaking, it is true that the party who asserts the affirmative of the issue has the onus probandi upon him; but this is far from being always the case, as was shown in the last chapter. It would be more correct to say, and it is the undoubted rule on the subject, "That the party on whom the onus probandi on the record lies, has generally and *prima facie* a right to begin."

§ 34. In this rule two things are to be observed: First, that the onus probandi which influences the right to begin is the onus probandi as developed *on the record;* any shifting of the onus probandi after the case has been gone into (1) cannot, of course, affect the present subject;(*a*) it is the duty of the judge to examine the record, and see on whom the onus probandi lies *there*, and call upon the party to begin accordingly.(2) But,

(*a*) See § 10, n. 1; §§ 3, 5, and notes.

1. In DeGraff vs. Carmichael, 13 Hun. 129, the court say: "As to the third point raised by the appellant, it is only necessary to inspect the pleadings to determine this question, and it can only be determined by so doing. The action was upon a note. Its execution was not denied. There was nothing in the first instance for the plaintiff to prove. When the trial was ready to proceed, it seems no suggestion was made as to which party had the affirmative. The plaintiff's counsel stated his case and presented the note, and, upon its appearing to be mutilated, called the witness to identify it and to explain how it came in that condition.

But this was in reference to no issue raised by the pleadings. When the evidence was closed the question arose for the first, as to who had the right to make the closing address to the jury, and the learned justice very properly held that the defendant's counsel had that right. Certainly this was so according to the pleadings, nor do I see that anything had taken place at the trial by which the defendant had waived such right. A different ruling would have been erroneous, and would have entitled the defendant to a reversal, in the event that the verdict had been in the plaintiff's favor, Millard vs. Thorn, 56 N. Y. 405; Elwell vs. Chamberlain, 31 Id. 614.

2. In The Penhryn Slate Company vs. Meyer, 8 Daly 62, at the opening of the trial, plaintiff moved for judgment on the pleadings. The motion was denied. Under objections of the plaintiff the court allowed the defendant to open the

secondly, it is to be remarked that that party has only the *prima facie* right to begin, as his adversary may (in most instances, at

case, to which ruling the plaintiff excepted. When the evidence was in, plaintiff again claimed the right of the party holding the affirmative, and was allowed by the court to make the closing address to the jury. The jury returned a verdict in the sum of $19 for the plaintiff. On appeal, Daly, C. J., said:

"The plaintiff was not entitled to judgment upon the pleadings. The cause of action as averred—the plaintiff's right to recover $219, the balance due upon certain mantels, &c., of the value, when set up, of $390, upon which $171 had been paid—was not admitted by the answer. The answer admits that the plaintiff sold to the defendant mantels, hearths and frames, of the amount and value as stated when delivered. That the goods were delivered and set up, but that a part thereof was not perfect and according to agreement.

"There was a distinct denial that the plaintiff delivered and set up the articles sold—and which they had agreed to deliver and set up—which left it for the plaintiff to prove performance of the contract averred by the complainant and admitted by the answer, or the answer might be regarded as admitting the sale and delivery of the articles, and averring the right to receive damages upon the ground that the articles when set up were not of the kind or value agreed upon. Taking the whole answer together, this may have been the proper construction of it; so that in either case the motion for judgment upon the pleadings was properly denied.

"In an action for goods sold and delivered for a stipulated sum, an answer that the articles delivered were not of the quality, kind or value agreed upon, is either an answer to the whole demand, upon the ground that the contract had not been performed, or is available by way of recoupment to reduce the price agreed upon to the sum which the defendant, who has kept the articles, ought to pay; and all that the plaintiff ought to have for the defective articles he delivered. Farnsworth vs. Garrand, 1 Camp. 38; Fisher vs. Samunda, Id. 190.

"In either aspect it is a denial that the plaintiff delivered the articles agreed upon; and that being the issue created by the pleadings, the affirmative of it is upon the plaintiff to show the performance of the contract on his part, which has not been admitted.

"The judge at the trial, however, held otherwise. He held that the defendant had the affirmative of the issue, to which the plaintiff excepted; whereas if, as he had previously held, the plaintiffs were not entitled to judgement on the pleadings, then the affirmative of the issue was certainly with them.

"There are, therefore, two questions—1st. Was the judge right in holding that the defendant had the affirmative of the issue? and, 2d, If he was not, was the

least) get it from him by admitting his *prima facie* case.(1) Thwaites vs. Swainsbury, *infra*, p. 31.

1. Where the answer admits the making and delivery of a promissory note sued upon, and sets up an affirmative defence, the defendant has the right to open and conclude. and it is error to deny it, Lindsley vs. Eu. Pet. Co., 3 Lans. 176.

In Smith vs. Sergent, 67 Barb. 244, was a suit upon a promissory note for $500, made by the defendant, and payable to Henry J. Corbin, the plaintiff's testator, on demand, with interest. The consideration of the note, as expressed therein, was the purchase by the defendant, from Corbin, of his "stock, farming and dairy tools."

The defence was, first—That the note was given by Corbin to his daughter, the defendant's wife, at or about the time it was made; and, second—That it had been satisfied by the giving of another note by the defendant to his wife, at the request of Corbin, in its place and stead. There was also a counter claim, made by the defendant, for board. attendance, &c., furnished by him to Corbin and wife. The jury found in favor of the defendant on all the issues, &c. The court say: "The plaintiff's case, as stated in the complaint, except the averment of indebtedness, which was a conclusion of law, was expressly admitted by the defendant's answer, and the matters of defence stated in the pleadings were entirely affirmative. Hence the affirmative of the issues between the parties on the record was with the defendant. The learned judge at the circuit held otherwise; but this ruling is here of no importance, inasmuch as the plaintiff cannot be heard to complain, for he claimed and took the benefit of the ruling, and the defendant was not injured by it, as the verdict was in his favor, notwithstanding the supposed advantage afforded thereby." See Bowen vs. Speers, 20 Ind. 146.

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error cured by allowing him, after all the evidence was given, to close the case in summing up to the jury?

"I have already said that the affirmative of the issue necessarily created by the pleadings was with the plaintiff. Where the plaintiff's cause of action is affirmatively admitted, and the admission made leaves him nothing to prove—the defence set up being in the nature of a counter claim—the affirmative of such issue is upon the defendant, who is entitled to begin and close the case. But that was not the state of facts here. The pleading, in whatever aspect it is viewed, denied that the articles delivered were of the kind agreed upon—the averment being that "a part of them were not perfect and according to agreement." It was, in substance, that the contract averred in the complaint had not been performed, and as the obligation was upon the plaintiffs to show that it had been, they had the affirmative of that issue, and were entitled to begin and to close the case.

§ 35. For as it is a principle that the jury are only summoned to try matters in issue, and nothing else, any fact admitted on the record cannot be questioned, (1) and no evidence is required

1. It is a fundamental rule in pleading that a material fact asserted on one side and not denied on the other is admitted, Summons vs. Jenkins, 76 Ill. 482; Briggs vs. Dorr, 19 Johns. 95; Jack vs. Martin, 12 Wend. 316, Raymond. vs. Wheeler, 9 Cow. 295; nor will its existence be suffered to be denied—nor facts proved inconsistent with such admission, Robbins vs. Codman, 4 E. D. Smith 325; Page vs. Willet, 38 N. Y. 31; Ridgway vs. Longacre, 18 Pa. 215; Thatcher vs. Hunn, 12 Iowa 303; Watson vs. Higgins, 7 Ark. 475. But if the matter is not well pleaded and is not an answer to the breach assigned in the declaration, it cannot be considered an admission, Simmonton vs. Winter, 5 Pet. 141. The admissions will not bind beyond the facts contemplated by the pleadings, as, in an action on account—*held*, that the defendant could not insist upon an award made upon the account as a bar to the suit, although the fact of the award appeared from the plaintiffs' evidence, Brazell vs. Isham et el., 12 N. Y. 9. But if the award had been specially pleaded so as to have been in issue the case could have been different. See n. 1, § 32. *ante*.

"The authority relied upon by the respondent, Hoxie vs. Green, 37 How. Pr. 97, was a very different case from this The action there was upon a promissory note, the making of which was admitted, and the making of the note by the defendant was all that the plaintiff could be required to prove in the action brought upon it. The defence set up was that it was given under duress, and therefore without consideration; that it was transferred to the plaintiff after it was due, and that he was not the real owner. These allegations requiring no reply were deemed denied by the plaintiff, Code, § 168, and, upon the issue thus created, the affirmative was with the defendant—the plaintiff in the pleadings being entitled to recover without the production of any evidence. The ruling at the trial, that the defendant had the affirmative of all the issues, was therefore affirmed. Such was also the case of Huntington vs. Conkey, 33 Barb. 218, where the note sued upon was admitted, and the defence set up was usury, which it was incumbent upon the defendant to prove affirmatively.

"Where the plaintiff has the affirmative of the issue, he has the right to open and close the proofs, and the right to reply in summing up the case to the jury. It is a legal right—not a matter in the discretion of the court—and if he is deprived of it, it is error, Millard vs. Thorn, 56 N. Y. 502. After the denial of the plaintiff's motion for judgment upon the pleadings, the judge, as I have said, held that the defendant had the affirmative of the issue, to which the plaintiff excepted. The defendant then gave all his testimony, and when he rested the

*30 to support it;(1) and in like manner, if a *party or his counsel makes any admission in open court,(2) no evidence ought to be given upon it;(a) and if the admissions so made go to the full extent of recognizing the *prima facie* case of the adversary, *i. e.*, go so far as to admit that in the absence of any evidence being adduced he is entitled to a verdict, it is evident that, according to the principle laid down in the last chapter, the onus probandi no longer lies upon him, and he ought not to be called on to

(a) Paige vs. Willet, 38 N. Y. 31; Robins vs. Codman, 4 E. D. Sm. 325; Brazil vs. Isham, 12 N. Y. 9.

1. Where a fact proposed to be proved at the trial by one party is admitted by the other side, it is not error for the court to refuse to let it be proved by witnesses, Pridgen vs. Bannerman, 8 Jones (N. C.) 53; but the fact must be admitted at the trial, and not before the jury are sworn, Lowery vs. Vernon, 3 Watts 317, and for this purpose attorneys have power to bind by written admissions as to the facts of a case, Harvey vs. Thorpe, 28 Ala. 250, and when made in court for the purpose of a trial are conclusive, Thompson vs Thompson, 9 Ind. 323, and they are held competent evidence in a second trial, Elwood vs. Lannon, 27 Md. 200; but admissions in a trial are not to be extended by implication, Dennis vs. Dennis, 15 Md. 73.

2. When the defendant, in open court, before entering upon the trial, admits the plaintiff's cause of action, and thus removes the necessity of any proof on his part, he will be entitled to open and close, Aurora vs. Cobb, 21 Ind. 492; Katz vs. Kuhn, N. Y. Com. Pleas, Apr. 1880, 9 Rept'r. 632; 1 Phil. Ev. Cow. & Hills Notes 818, 1 Moo. & Malk, 3 Stark. 176, Hill vs. Fox 1 F. & F. 136; Overbury vs. Muggrige, Id. 137.

It seems to have grown into a practice to leave it optional with the plaintiff, whether he will accept oral admissions of all the facts incumbent on him to prove by the defendant at the trial in cases where admissions could have been made by plea or other means of getting them on the records, simply to give the defendant the right to begin. He ought to spread his admissions on the records. Pontifex vs. Jolly, 9 C. & P. 202; Price vs. Seaward, C. & Marsh, 23; Brooks vs. Clark, 4 F. & F. 484; Wrigglesworth vs. Aikin, 5 Cush 293; Merriam vs. Cunningham, 11 Id. 40; Snow vs. Batcheldor, 8 Id; Johnson vs. Wideman, Dud. (S. C.) 325.

plaintiff gave his evidence in reply; and when all the testimony was in, the plaintiff claimed the right to close to the jury, as having the affirmative, upon which the judge said that he thought he was in error when he deprived the plaintiff of the right of opening, and that he would therefore give them the affirmative, which, as the testimony was all in, was the closing address to the jury, of which the plaintiff, it appears, availed themselves.

begin.(1) But it must be carefully remarked that in order to obtain this, the above principle ought to be attended to, namely, that the party wishing thus to shift the right to begin must

1. A special plea admits a cause of action, if one be stated, of the nature set forth, but not precisely as laid in kind, degree, extent, or value; these must be shown by proof unless exact precision in the admitted allegation be material to the plaintiff, Rich vs. Rich, 16 Wend. 633; Wagner vs. Bell, 4 Monr. 7; Haley vs. Caler. Minor 63; as when it appeared that the plaintiff owned absolutely some of the goods injured, and was part owner of the rest, it was held, that a refusal to exclude evidence of the trespass to the goods of which the plaintiff was only part owner, was correct, the defendant not having raised the question of ownership in his plea, Lefebre vs. Utter, 22 Wis. 189.

If issue be joined in assumpsit on the common counts on a plea of payment, and no evidence be given at the trial by either party, the plaintiff will be entitled to a verdict. The verdict, however, must be for nominal damages only, unless the plaintiff produce evidence of the extent of his claim, for the plea does not admit of any specific amount. The N. Y. Dry Dock Co. vs. M'Intosh, 5 Hill 290. So payment of money into court admits the cause of action, and in Perrin vs. Mon. R. R. Co., 11 C. B. 863, the court say: "If the declaration is general and unspecific, the payment of money into court, although it admits a cause of action, does not admit the cause of action sued for, and the plaintiff must give

"As the plaintiff's right to open the proof affirmatively was denied, and they excepted to the ruling, I do not think that the error was cured by allowing them, after the testimony was in, the closing address to the jury. The opening of the case to the jury, by the plaintiffs, and the laying before them of their evidence in the first instance, and confining the defendant to evidence in the way of reply, was a part of their legal right, of which they were deprived under exception; and I fail to see how the error is cured by allowing them afterwards what was their further right, the final address to the jury. Depriving a party of one part of his legal right is certainly not cured by allowing them another part. This being, as the Court of Appeals have held, a strict legal right, the judgment will have, for this error alone, to be reversed, which is to be regretted, as the case has been already tried three times, and upon two occasions has resulted in favor of the defendant. We are not required under the new code to grant a new trial, if in our opinion substantial justice does not require it (§ 1003), but it would be going very far to say that, in our judgment, the plaintiff's rights were in no way materially affected by allowing the defendant to open the case and to lay his evidence before the jury in the first instance. I think, therefore, that the judgment will have to be reversed."

admit the *entire prima facie* case of his adversary;(1)(*a*) the admitting important portions or facts of it will not suffice for this purpose. For instance, in the case of Doe d. Warren vs. Bray,(*b*)

(*a*) Lowry vs. Vernon, 3 Watts 317: Harvey vs. Thorpe, 28 Ala. 250; Thompson vs. Thompson, 9 Ind. 323; Elwood vs. Lannon, 27 Md. 200. See *ante* n.
(*b*) M. & M. 166.

1. In an action by the endorsee against the maker of a note, a defendant who, by filing an admission of all the facts necessary to be proved by the plaintiff in order to make out a *prima facie* case, obtains the right to open and close, and is not thereby precluded from introducing evidence to show that the plaintiff has no title to the note, Spaulding vs. Hood, 8 Cash. 602; see, also, Loggins vs. Buck, 33 Tex. 113. In an action for goods sold and delivered, an admission by the defendant, that he purchased and received the goods in question to be paid for not in money, but in specific articles, is not sufficient to entitle him to open and close, Bradley vs. Clark, *supra*. So in trespass *de bonis asportatis*, the defendant pleaded the general issue, and filed a brief statement, alleging as an officer he attached the goods as the property of a stranger—*held*, that the plaintiff had the burden, notwithstanding the defendant admitted that the property was once in the plaintiff, and assumed the burden of proving the transfer to such stranger, Ayer vs. Austin, 6 Pick. 225; Bangs vs. Snow, 1 Mass. 181; see——— *ante*. Instances of special pleas amounting to the general issue. See tit. case.

evidence of the cause of action sued for before he can recover larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant unless the defendant admitted the particular claim made by the declaration, we think the payment of money into court admits the cause of action sued for. See Richards vs. Nixon, 20 Pa. 19. On the plea of tender the affirmative is on the defendant who has the right to open and close. Auld vs. Hepburn, 1 Cr. C. C. 122."

In equity a material averment in a bill neither admitted or denied must be supported by proof, Wilson vs. Kinney, 14 Ill. 27; Dooley vs. Stipp, 26 Id. 86, but evidence is unnecessary where the bill is confessed, Thatcher vs. Hunn, 12 Iowa 303; Clements vs. Moore, 6 Wall 299; Parker vs. Gorton, 3 R. I. 27. But a bill wanting in equity can derive no aid from an answer, and is liable to be dismissed on motion at any time, although the answer may disclose a case that would entitle the complainant to relief, Lockard vs. Lockard, 16 Ala. 423; Sampley vs. Weed, 27 Ala. 621; 6 Wall. 275.

If an immaterial issue be submitted to a jury and they render a verdict thereupon, final judgment cannot be announced upon the finding, but only a judgment of repleader, Trott vs. West, 1 Meigs. 163; Sullenberger vs. Gest, 14 O. 204; and the omission to find an immaterial issue is of no consequence, Thornton vs. Sprague, Wright (O.) 645; Ray vs. Clemens, 6 Leigh. 600.

which was an action of ejectment, the lessor of the plaintiff claimed as the heir-at-law of H. B., the person last seized. A. B., one of the defendants, was the son of T. B., brother of H. B., and he was undoubtedly heir-at-law to H. B., if he were legitimate. Defendants proposed to admit that if the defendant A. B. were not legitimate, the lessor of the plaintiff was heir-at-law of the person last seized, and then claimed the right to begin, contending that the legitimacy of A. B. was the only point in question, and the affirmative of it lay on them. But Vaughan, B., overruled this, and said that the question was whether the lessor of the plaintiff was heir-at-law to H. B., and that the affirmative of it lay on the plaintiff; that it might turn out that the question turned entirely on the legitimacy of A. B., but still it was not on that fact, but on the heirship of the lessor of the plaintiff; and that, as the admission did not go far enough, the plaintiff should begin.

§ 36. Again, in the case of Doe d. Tucker vs. Tucker,(*a*) lessor of plaintiff in ejectment claimed as heir-at-law of J. T. Defend-
*31 ant *claimed under a conveyance by J. T., and, offering to admit the heirship of the lessor, claimed the right to begin; to which the plaintiff replied that that was not sufficient, as he should also admit that the ancestor of the lessor of the plaintiff had died seized; and per Bolland, B.: "Unless the defendant admits the whole case of the plaintiff, the plaintiff is entitled to begin." In the case of Turberville vs. Patrick,(*b*) which was an action of trover for goods, to which the general issue was pleaded, it appeared that the action had been brought by order of the Vice-Chancellor, in order to try the validity of a commission of bankruptcy which had issued against the plaintiff, and had ordered the defendant to admit the finding and conversion of the goods. Defendant claimed the right to begin on the ground that he was bound to admit the plaintiff's right to recover, unless he could make out a case in answer. Sed per

(*a*) M. & M. 536. (*b*) 4 C. & P. 557

Bosanquet, J.: "If the Vice-Chancellor had intended that this action should not be tried in the ordinary way, he would have directed an issue, and have made the present defendant the plaintiff in the issue. Plaintiff must begin."(*a*)

§ 37. We must, however, here notice the case of Thwaites vs. Swainsbury,(*b*) which was an action of assumpsit for goods sold, &c.; and by a rule of court, which had been obtained by consent, it was ordered that the defendant should admit the plaintiff's case; sed per Tindal, C. J.: "The plaintiff must begin and state the case; this is not like the case of an issue, proof of the affirmative of which lies on the defendant."(*c*)

It is, perhaps, hardly requisite to observe that in any action where the defendant pleads the general issue, the plaintiff must begin, as that plea puts him on the proof of his case generally.(1)(*d*)

(*a*) See *ante* p. 12, n. 2.
(*b*) 5 C. & P. 69.
(*c*) See *ante* p. 12, n. 2
(*d*) Bump vs. Smith, 11 N. H. 48; Tappan vs. Jennes, 21 id. 232; Belknap vs. Wendell, 21 id. 175. See *ante* p. 29, 30. See under tits. Assumpsit, Debt, Covenant, Case, &c.

1. It admits nothing on the merits, or which go to bar the action, Child vs. Allen, 33 Vt. 475; Stroud vs. Springfield, 28 Tex.; Ragsdale vs. Gohlke, 36 Id. 286; although special pleas be pleaded with the general issue, the burden is on the plaintiff to prove his case, and he is entitled to open and close, Jennings vs. Maddox, 8 B. Mon. 430, *ante* p. 29. It admits no immaterial matter of inducement, Bennison vs. Davison, 3 M. & W. 179; Green vs. Hill, 3 Ex. 801; nor averments not traversable, Gale vs. Lewis, 9 Q. B. 730; King vs. Norman, 4 C. B. 884; Mitchell vs. Crasweller, 13 C. B. 337. See Defamation, *infra*.

Plea of the general issue admits the character and competency of plaintiff to sue; it admits the title of the plaintiff to sue as executor or administrator, Thyune vs. Prothoe, 2 M. & S.; Hunt vs. Stevens, 3 Taunt. 113; Curtis vs. Herric, 14 Cal. 117; it admits marriage in an action by husband and wife for battery of the wife, Buller vs. N. P. 20; and admits plaintiffs are a corporation capable of suing, Concord vs. McIntre, 6 N. H. 527. A plea of set-off stated that the plaintiff made his promissory note payable to A. C., and that A. C.'s administrator endorsed it to the defendant; replication, that the supposed cause of set-off did not accrue to the defendant within six years; it was held that the replication admitted the making of the note and the endorsement, and that the defendant might avail himself of the memorandum of the payment of interest written on the note by A. C. to bar the statute of limitation, Gale vs. Caperer, 1 Ad. & E. 102. After the jury have been sworn the defendant cannot, as a matter of right,

§ 38. As more grounds of action than one may, under certain restrictions, be stated in the declaration, and as a defendant *32 *may, with leave of a judge, plead several distinct and even inconsistent matters to the same charge, it frequently happens that there are several issues arrived at on the record; and if so it is very possible that the onus probandi in some of them may lie on the plaintiff, and in others on the defendant.(1) Under such circumstances, the rule, which shall be more particularly considered in its place, is, that if the onus of proving any

1. In a written contract containing various undertakings, the plaintiff may complain of the breach of one or of all, but, if he confine himself to one, he admits the performance of the others, Chinn. vs. Hamilton, 1 Hemst. 438, and the court may, in its discretion, order one of the issues tried first, and decide as to this particular issue who shall begin. In Bedell vs. Powell, 13 Barb. 184, Wright, J., said: "One branch of the defence interposed by the answer in this case was the pendency of a former action. The reply denied that an action was pending for the same cause at the commencement of the suit, and alleged that prior thereto such action was discontinued, of which the defendant had notice—thus raising an issue of fact. After the jury had been impannelled, the judge, at the suggestion of the counsel for the plaintiff, and against the objection of the defendant's counsel, decided to try first this issue; thus, as the defendant com-

withdraw the general issue and assume the burden with the opening and closing. It is within the discretion of the court, Mason vs. Seitz, 36 Ind. 516. See Tappan vs. Jenness, 21 N. H. 230. It seems that statements made by parties in the course of their pleadings in *another action* are not to be used as admissions by them in a subsequent action, except where they are estoppels. A verdict and judgment are conclusive upon any matter legitimately within the issue and *necessarily* and directly found by the jury; and when the record itself does not show that the matter was necessarily and directly found, evidence *aliunde* consistent with such records may be received to prove the fact. If the mattter was not within the issue, and could not rightly have been litigated in the former action, parol evidence will not be allowed to show that it was passed upon, Royce vs. Burt, 42 Barb. 663; Appleton vs. Warner, 51 Barb. 270; Wood vs. Jackson, 8 Wend. 9; Miles vs. Caldwell, 2 Wal. 36; Lawrence vs. Hunt, 10 Wend. 80; Gardiner vs. Buckbee, 3 Cow. 120; Burt vs. Sternburgh, 4 Id. 559; Child vs. Allen, 33 Vt. 476. So a party may estop himself from reversing a judgment on error after he has pleaded the same in bar of an action, Wills vs. Kane, 2 Grant Cas. Pa. 60. A plea in a discontinued action is not evidence against defendant in another action, Allen vs. Hartley, 4 Dong. 20.

one issue lies on the plaintiff, he is entitled to begin.(1) For the present, however, we will only consider the case of a single issue, and proceed to illustrate the general rule, that the party on whom the onus probandi lies is entitled to begin, by showing its application in trials by jury and at the Quarter Sessions.

Section 2.

Of the Right to Begin in Civil Actions.

§ 39. Civil actions, as is well known, are divided into real, mixed and personal, in the first of which land only is demanded; in the second, land and damages; and in the third, damages alone. There are, besides these, some other civil proceedings which will require notice, such as proceedings on quo warranto, &c. With respect to real and mixed actions, it is to be observed that, though formerly very numerous, they have been, by statute 3 & 4 Will. IV., c. 27, reduced to *four*—writ of right of dower, writ of dower *unde nil habet*,(2) *quare impedit*, and ejectment; the latter is not properly a mixed action, as it is in form a personal

1. Where one of the issues presented by the pleadings was, whether notes sued on were usurious, it was not error to deny the defendant's counsel the privilege of opening and closing the argument, as to that issue. It is not usual thus to divide the issue, Cent. Bank vs. St. Johns, 17 Wis. 157. See *ante* p. 29; Jackson vs. Pittsford, 8 Blackf. 194; Buzzell vs. Snell, 25 N. H. 474; Chisley vs. Chisley, 37 Id. 229; Huntington vs. Conkey, 33 Barb. 218; Lex., &c., Ins. Co. vs. Paver, 16 Ohio 324.

2. The burden is on the demandant of dower of proving that she is the lawful widow of the deceased, and it is not shifted by her establishment of a *prima facie* case, Nichols vs. Munsell, 115 Mas. 167; but dower itself will be favored as against a devise or gift in lieu of, Van Arsdale vs. Van Arsdale 2 Dutch. 414.

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plains compelling him to enter upon a part of his defence before the plaintiff had gone through with his case. This, however, is not an error that can be reviewed in a bill of exception. The order in which proof shall be received on a trial is in the discretion of the judge, 1 Cow & Hill's notes, 710 to 720; 3 Barb. 407, and is not reviewable on error or appeal, People vs. Baker, 3 Hill 159; Rapalye vs. Price, 4 Hill 119; Lansing vs. Russell, 2 Comst. 563; 6 Barb. 109."

action of trespass,(*a*) as land is not demanded in the original writ, which by a fiction of law is supposed to be issued. The action of ejectment shall be fully considered in the sequel.(*b*) *33 And in respect to the other three, little or nothing *is to be found in the books on the subject which we are here attempting to illustrate; and were it even otherwise, it is doubtful whether, from their rare occurrence, it would be worth while to do so in a small work like the present. Passing by, therefore, the subject of real actions, we proceed to consider those which are either personal or mixed. The essential point in which these differ from the former is, that in real actions, land (or some right relating to land) is demanded *eo nomine* and alone: while in the latter, not only is some wrong or breach of contract complained of or even land demanded, but *damages*, either nominal or serious, are sought to be recovered for the injury brought.

§ 40. Now, when on the issue raised by the pleadings the onus probandi lies on the plaintiff, he, of course, has to begin, and prove at the same time the injury done and the quantity of damage he has sustained thereby.(1) But in those cases where

(*a*) Steph. Pl. 23, 48 (*b*) See *infra* Ejectment.

1. "And prove at the same time the injury done and the quantity of damages sustained thereby," suggests a grave error. Damages being a question of law are not the subject of a traverse, Jones vs. Lees, 1 H. & N. 194; Keindel vs. Scull, 4 Com. B. N. S. 117; Hale vs. Lawrence, 2 Zab. 79; Hogencamp vs. Acorman, 4 id. 136; Wood vs. Rowan, 5 Johns. 41; they are the legal effect of issuable facts of injury, Kramer vs. Stock, 10 Watts 115; Willes 581. They are so purely a matter of law, that, whenever a wrong is done to a right, and though no substantial injury be proved, nominal damages will be given in support of the right, Whipple vs. Cumb. Man. Co., 2 Story 661; Bagby vs. Harris, 9 Ala. 173; Browner vs. Davis, 15 Cal. 9; Devendorf vs. Werf. 42 Barb. 227; Bond vs. Hilton, 2 Jones (N. C.) L. 149; Seal vs. Moreland, 7 Humph. 575; Paul vs. Slason, 22 Vt. 231; Munroe vs. Stickney, 48 Me. 462; in R. R. Co. vs. Mutherspaugh, 71 Ill. 572;—so it is held that a plea to the damages, *non damnificatus*, is bad on general demurrer, Clearwrter vs. Meredith, 1 Wall. 25; and Sutherland, J., in McClure vs. Erwin, 3 Cow. 332, says: "The plea should go to the right of action, not to the question of damages." He further says that *non damnificatus* is confined to a single plea, viz., in a condition of a bond *to indemnify* and save *harmless*, Archer vs. Archer, 8 Gratt. 539. See case of Grafflin vs. Jackson et als.,

the onus of proving the facts in issue lies on the defendant, still the plaintiff has to prove the amount of his damages; this is an onus probandi which *always* lies on him,(1) and it becomes a question to determine which party has a right to begin; in other words, whether the mere onus of proving damages where the onus of proving the facts in issue lies on the defendant, will confer on a plaintiff the right to begin.

1. But the burden of damages has nothing to do with the burden of the issue which alone determines the right to begin; damages are a legal consequence of a legal recovery. The question of damages does not arise until a *prima facie* case is made out, or testimony be given sufficient in law to authorize a judgment; or, in the language of Bayley, in Jackson vs. Hesketh, § 42, *infra*, "the question of damages never arises till the issue has been tried." Such is the philosophy of our system of judicial remedies that the amount of relief is not the subject of *primary* controversy. All such questions are just as determinable after default as before. The law is well stated in Watson vs. Seat, 8 Fla. 446: "That a defendant, against whom a default has been taken for want of a plea, is not absolutely out of court, but still retains the right to appear upon an inquest of damages, to cross-examine the plaintiff's witness, to introduce evidence in mitigation of damages, and to address the jury thereupon," Loeber vs. Delahaye, 7 Iowa 478; 18 Mo. 604. The default leaves no issue for the jury, Smith vs. Billett, 15 Cal. 23, as it admits all remediable facts well set out in the declaration. Rowe vs. Table, &c., Co., 10 Cal. 441; McGregor vs. Shaw, 11 Cal. 47—250; Peck vs. Wilson, 22 Ill. 205; Whitty vs. Douge, 9 Iowa 597. But suffering judgment by default in assumpsit on a note admits a cause of action to the amount of the note, unless part payment be endorsed, Greene vs. Herne, 3 T. R. 301; so if there be a bill of particulars, Tindall vs. Baskett, 2 F. & F. 644; Bonfield vs. Smith, 2 M. & R. 519; Hayward vs. Radcliff, 4 F. & F. 500. But in an inquest of damages, defendant cannot ask instructions touching his liability, for that

criticised in 3 N. J. Law J. 267. Nominal damages only will be awarded by the law, when a special plea of payment is pleaded to the common courts in assumpsit, if no evidence be given at the trial, N. Y. Dry D. Co. vs. M'Intosh, 5 Hill 290. The question of the right to begin depends upon the proper interpretation of the material traverses, the legal issues; the denial of indebtedness does not raise an issue of fact for this purpose, for indebtedness is a conclusion of law. Smith vs. Sergent, 67 Barb. 243. See p. 2, n. 4. The test is, that such allegations as may be stricken out, and yet leave the declaration good as to all matters material to the right, are utterly insignificant in determining the burden, and hence the right to begin, *ante* p. 2, 3.

§ 41. This is a question so simple in its enunciation, and of such importance and constant occurrence in practice, that one would suppose it must have been settled in the very infancy of our law. Yet, as probably few points have given rise to more conflicting and irreconcilable decisions than the present, and as the judges in July 4, (Will. IV.,) 1833, promulgated a rule altering the practice in this respect in some particular forms of action, leaving it untouched in others, it becomes imperatively necessary, to a right understanding of the subject, to enter fully into the *34 consideration of the cases *which were decided, and the doctrine which prevailed previous to the making of that rule, and then to consider both the rule itself and the cases which have been decided in illustration of it.

§ 42. The first case which seems directly to bear on this subject is that of Hodges vs. Holder,(*a*) which was an action of trespass *quare clausum fregit*, to which the defendant pleaded a right of way, and was by Bayley, J., allowed to begin. The next, which is quite in accordance with it, is that of Jackson vs. Hesketh.(*b*) This, also, was an action of trespass *quare clausum fregit*, to which defendant pleaded a public right of way; and per Bayley, J.: "*The party who has to prove the affirmative of the issue ought to begin; the question of damages never arises till the issue has been tried.*"(*c*)

§ 43. The next two cases appear inconsistent with these. In Robey vs. Howard,(*d*) which was an action against a party who

(*a*) 3 Camp. 366.
(*b*) 2 Stark. 518.
(*c*) The principle of this case can hardly be disputed. See *ante* § 40, n. 1, 2, Viele vs. Germ. Ins. Co., 26 Iowa 9. Justice Cranch, in dissenting opinion, affirms the doctrine in Sutton vs. Mandeville, 1 Cr. C. C. 187. See, further, *infra* tit. Case.
(*d*) 2 Stark. 555.

is settled by the default, Loeber vs. DeLahaye, *supra*, nor can he insist upon the fraud of the plaintiff, as that relates to the liability settled by the default, East Ind. Co. vs. Glover, 1 Stra. 612. The default should be opened. Courts exercise equitable jurisdiction over judgments entered by warrants of attorney, wherein estoppels by specialty do not arise, by awarding a feigned issue to try the fraud, letting the judgment stand, Barrow vs. Bispham, 6 Halst. 117; 2 Id. 199; Barnes' Notes 277; 2 Johns. Cas. 258. See § 45, *infra*, n. 1.

had undertook to lay out for the plaintiff a sum of money in good security, but was alleged to have taken an insufficient one, to which defendant pleaded in abatement the non-joinder of one G. D. as defendant, Lord Chief Justice Abbott said: "The plaintiff must begin, *since at all events it is incumbent on him to prove his damages.*"(1) And in Lacon vs. Higgins,(*a*) which was an action of assumpsit to recover a large sum of money, the amount of millinery supplied to the defendant, and the only plea was coverture, the same learned judge said: "*As the plaintiff had to prove the amount of his damages, he was entitled to begin.*"(2)

§ 44. These cases, however, are perhaps reconcilable with those of Hodges vs. Holder,(*b*) and Jackson vs. Hesketh.(*c*) In these latter the actions were manifestly brought to establish a right to some lands, and not for the purpose of recovering *35 *any heavy damages; while in Robey vs. Howard,(*d*) and Lacon vs. Higgins,(*e*) the damages sought were considerable, and the sole gist of the action. The cases of Hodges vs. Holder,(*f*) and Jackson vs. Hesketh,(*c*) seemed to have completely settled the position that when the action, though in form brought to recover damages, is in reality instituted in order to try a contested right, and only nominal damages are sought in order to establish that right, and the onus probandi lies on the defendant, he is clearly entitled to begin.

(*a*) 3 Stark. 167. (*c*) 2 Stark. 518. (*e*) 3 Stark 178.
(*b*) 3 Camp. 366. (*d*) 2 Stark. 555. (*f*) 2 Camp. 366.

1. This is erroneous. On the trial of an issue on a plea in abatement, the defendant who pleads it has the burden of proof, and, as a consequence, has the right to open and close, Jewell vs. Davis, 6 N. H. 518; Shepard et al. vs. Graves, 14 How. 505; Fowler vs. Byard, 1 Hemst 213. See, further, *infra*, § 46.

2. But in an action of debt for goods sold and delivered, and account stated on the simple plea of coverture, defendant begins, Woodgate vs. Potts, 2 Car. & Kir. 458; so held when the action is on a promissory note, Cannam et al. vs. Farmer, id. 747; and in assumpsit if there be a bill of particulars, and there be an express admission at the trial of the amount claimed in the bill and the pleas be affirmative only; even though the claim be for unliquidated damages the defendant should begin, Roscoe's N. P. 276; Tindall vs. Baskatt, 2 F. & F. 644; Bonfield vs. Smith, 2 M. & R. 519.

§ 45. The next case, however, went a step farther; it was that of Bedell vs. Russel,(*a*) and was brought for assaulting, beating and shooting at the plaintiff, on divers occasions; to which defendant pleaded, that he was a captain of a ship on board of which plaintiff was a mariner; that the latter was engaged in mutiny, in order to suppress which the trespasses mentioned were committed: replication, *de injuria*, &c.: defendant claimed the right to begin, and cited Hodges vs. Holder,(*b*) and Jackson vs. Hesketh;(*c*) to which it was urged for the plaintiff, that those were cases of trespass *quare clausum fregit*, where certain rights were in question; that here the essence of the inquiry was a claim of damages: and Best, C. J., said: "But for the authorities cited I should certainly have thought that the onus of proving damages sustained gave a right to begin: but as it is of the utmost consequence that the practice should be uniform I shall consider myself bound by those cases till the matter shall be settled in full court."(1) N. B. Robey vs. Howard (*d*) and Lacon vs. Higgins (*e*)

(*a*) R. & M. 293. (*b*) 2 Camp. 366. (*c*) 2 Stark. 518. (*d*) 2 Stark. 555. (*e*) 3 Stark. 167.

1. This case, no doubt, presents the rule correctly, and is followed, generally, in this country; and whenever justification or *son assault* is pleaded, simply, the defendant has the right to open and close, McKinzie vs. Milligan, 1 Bay (S. C.) 248; Goldsbury vs. Slatterville, 3 Bibb. 345; Downey vs. Day, 4 Ind. 53; Vance vs. Vance, 2 Metc. (Ky) 581; Coleman vs. Hagerman, 5 City H. R. (N. Y.) 63. The case of Young vs. Highland, 9 Gratt. 16, appears to be the foundation upon which the learned Dr. Minor (4 Minor's Inst. 650) lays down the rule that in Virginia, in any case of unliquidated damages, whether the action be *ex delicto* or *ex contractu*, the plaintiff must begin. The court say, in Young vs. Highland: "The only plea in this case was *son assault demesne*; to which the replication was *de injuria*. The plea uses the same general language as the declaration does, and professes to refer to the same assault and battery. It would have been sustained by proof of any assault made by the plaintiff on the defendant, followed immediately by an assault and battery of the defendant on the plaintiff, and the plaintiff could not have avoided that consequence by showing that the declaration and replication were both intended to refer to a different assault and battery. The plaintiff, by replying *de injuria*, admits that any assault and battery which the defendant may justify by proving that the plaintiff made the first assault, is the assault and battery for which the action is brought. If, there-

seem to have escaped the observation of all parties, or certainly the Chief Justice would have decided the other way. We shall have occasion to recur to this case presently.

§ 46. The damages, however, which a party seeks to recover, *36 may although serious in themselves, be so completely *defined by the form of the action, that the plaintiff is either entitled to recover to the amount stated in the declaration or not at all; and such damages are said to be *liquidated* in contradistinction to those which are left uncertain, and to be assessed by the jury, and are therefore called *unliquidated* damages. The distinction between these two species of damages as affecting the right to begin, came

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fore, several assaults and batteries are committed by the defendant on the plaintiff, and any of them can be justified, the plaintiff ought either to have in his declaration as many counts as there were assaults and batteries; or, if he has but one count, and the plea is *son assault demesne*, he ought to reply by way of new assignment. Otherwise a verdict must be rendered against him, though he may be able to prove, and actually prove, that other assaults and batteries were committed on him by the defendant which cannot be justified."

This case is unsound in two respects. First—The resolution of the general pleading in the case is not in accordance with authority, *i. e.*, the inherited English authority that it assumes to expound. Second—The right to begin is made to depend upon the possible aspects of the proof, rather than the actual state of the pleadings independent of proof.

As to the former, Bayley, J., says, in Barnes vs. Hunt, 11 East. 456: "The declaration is general—complaining of trespasses on divers days within a certain period. The defendant undertakes to meet that general and indefinite charge, and says, in effect, that whatever may be the number of trespasses that the plaintiff complains of within that period, he is prepared to show as many licenses. The replication states that the defendant, at the several days, committed the said several trespasses of his own wrong, and without the cause alleged. What does that put in issue, but that the defendant had a license to cover all those trespasses? Then, in common sense and understanding, we must take it that the cause put in issue by the replication is, that the defendant had not a license coextensive with the trespasses complained of, and a new assignment could have done no more than repeat the same thing." Lord Ellenborough, C. J., concurred in an opinion covering the same points, and, among other things, said: "What, then, does the replication import when it alleges that the defendant, of his own wrong, and without the cause alleged, committed the several trespasses? It

before the court in the case of Fowler vs. Coster.(*a*) This was an action of assumpsit, brought by the plaintiff, as indorsee, against the defendant as acceptor of two bills of exchange; the declaration also contained the common money counts. Defendant pleaded in abatement,(*b*) that the promises, if any, were made jointly with one C.; and on this issue was ultimately joined; and Lord Tenterden, C. J., said: "It would be inconvenient to say in all cases that the plaintiff should begin when he is to recover damages;

(*a*) M. & M. 241; 3 C. & P. 463. (*b*) See § 43, n. 1, *supra*.

denies the defendant's justification to the extent pleaded by him; it denies that he had license to commit the several injuries of which the plaintiff complained and is able to prove *within the* terms of his declaration. Whatever practice may have prevailed, this sense of the pleadings appears to me to be clear." In Adams vs. Andrews, 15 Ad. & Ell. (N. S.) 292, the above case is distinctly affirmed. The learned judge, in delivering the opinion in Young vs. Highland, misinterpreted the pleadings by overlooking the issue—the only issue in the case which was formed by the plea of *son assault*, &c., and the replication. The replication was, in effect, a general issue plea to the affirmative plea of *son assault*, &c. The point of error in the case is that the court lay down in the rule that evidence, under the *de injuria* replication, will be confined to the trespasses justified by the plea which may or may not reach all that are provable under the declaration; while the true rule, as laid down by Ellenborough, is, that the plaintiff can, under this replication, prove all the trespasses that he "*is able to prove within the terms of the declaration*," Hannen vs. Edes, 15 Mass. 351; 7 Rob. Pr. 687. If, then, it be the law upon authority, that a justifying plea of *son assault*, &c., claiming to comprehend all the trespasses in the declaration, must in fact and in law cover all that can be proved under the declaration, at the peril of having the plea disproved on the general replication by any facts provable under the declaration, the case of Young vs. Highland is of unsound tissue.

There are some cases that intimate that the testimony on the general replication to a plea of *son assault* will be confined to matters set up in the plea itself. But one of the averments is *quæ est eadem*—that it is the same trespass as in the declaration mentioned. Testimony in denial of this fact is certainly relevant; and the plea would be certainly overcome by proving a trespass within the legal purview of the declaration not justified by the plea. The second point of error—the basing the right to begin on the possible conditions of proof, instead of an interpretation of the pleadings independent of the proof—see *ante* §§ 3, 5, 10, notes.

that is the case in trespass where there are only special pleas on the record, yet the defendant usually begins."

§ 47. The counsel for the plaintiff then argued, that in the class of cases alluded to by the judge, the damages are merely nominal, and the *right* is really the only question in issue; that here the plaintiff had to prove the amount which he is entitled to recover; and even if it should be said that there can be no dispute as to the amount due on two bills of exchange, yet there are other counts in the declaration, (viz., the common money counts,) on which an uncertain amount of damages be recovered, and the court could only look at the record in deciding such a question as the present; besides, that it was of importance to have one rule, and not to make the course of practice different, as the cause of action might happen to be on a bill of exchange, or an account for goods sold, &c. But Lord Tenterden said: "It certainly is of importance that there should be a distinct general *37 rule; but *that rule need not be the same for every case, if it be such that its application is clear. No rule, probably, can be free from occasional inconvenience, but I think this is sufficiently general, and on the whole the most convenient; that whenever it appears on the record or by the statement of the counsel engaged, that there is really no dispute about the sum to be recovered, but the damages are either nominal or else mere matter of computation, then, if the affirmative of the issue is on the defendant, he is entitled to begin."

§ 48. There can be no doubt as to the correctness of the *decision* in this case, so far as it goes: viz., that where the damages sought to be recovered are either quite nominal, in order to try a right, or, though heavy, are so completely liquidated that there can be no question as to their amount, the defendant is entitled to begin, if the onus probandi of the issue lies upon him. But the proposition impliedly laid down in it, that the damages being the object of the action, and unliquidated, throws such an onus probandi on the plaintiff as to give him the right to begin, received an express negative in a case decided by Lord Tenterden himself, aided by

three other judges, a very few days after that of Fowler vs. Coster.(*a*)

§ 49. The case alluded to is that of Cooper vs. Wakley, (3 C. & P. 474, M. & M. 248, and also a printed report, Dec. 12, 1828.) This was an action brought by the plaintiff as surgeon to Guy's hospital, against the defendant as editor of a medical and surgical periodical, for a libel on his professional character. Four counts of the declaration charged different parts of the alleged libel, in which defendant criticised a certain surgical operation which had been performed by the plaintiff, and imputed to him for want of skill, &c. The fifth count charged a distinct libel, which professed to be a reply by the defendant to some newspa-
*38 per statements, which alleged that the *plaintiff had taken up unnecssary time in performing the operation, and also that he had been placed in his situation of surgeon to Guy's hospital through favoritism and corrupt influence. There were *seven* pleas, four of them justified the allegations of the libel, and imputed to the plaintiff unskilfulness in the operation, and asserted that a skilful surgeon would under similar circumstances have performed it in a much shorter time, and that the patient's life was probably sacrificed to such unskilfulness. In two more pleas, the defendant justified those parts which stated that the plaintiff had been elevated through corrupt influence; and the seventh plea stated that he, as an editor of a medical periodical, published the alleged libels, they being correct reports of what had occurred. Replication, *de injuria*. Defendant claimed the right to begin, and cited Hodges vs. Holder,(*b*) Jackson vs. Hesketh,(*c*) and Bedell vs. Russel;(*d*) to this the plaintiff's counsel replied—1. That the affirmative lay on the plaintiff. 2. That the damages were unliquidated, and therefore gave the plaintiff a right to begin; that the allowing the defendant to do so would totally alter the situation of the parties, and put the party who came into court to complain of a malicious libel in the situation of a

(*a*) M. & M. 241. (*b*) 2 Camp. 366. (*c*) 2 Stark. 518. (*d*) R. & M 293.

defendant on trial on a charge against himself. That of the cases which had been cited, two were questions of right, without any claim of damages, and the third, Bedell vs. Russel,(a) was decided by the judge against his own conviction, conceiving himself bound by the authorities. Lord Tenterden then consulted JJ. Bayley, Littledale and Parke, and all four were unanimously of opinion that the defendant had a right to begin; and Lord Tenterden said: "The general rule is, that the party on whom the affirmative lies has a right to begin; and in one at least of the cases cited, viz., Bedell vs. Russell,(a) the plaintiff was seeking
*39 to recover unliquidated damages. The *affirmative here is on the defendant, as he must make out the assertions he has made."

§ 50. This case, together with that of Bedell vs. Russell,(a) establish the position that the onus of proving unliquidated damages, even in cases of assault and libel, (the two worst species of civil injuries to the *person*,) does not confer a right to begin. That it does not do so when unliquidated damages are sought in respect of injuries to *property*, was established by the subsequent case of Cotton vs. James.(b) This was an action of trespass, containing one count for breaking the plaintiff's house and taking his goods, and a second for taking his goods and converting them: defendant pleaded a justification, that the plaintiff had been declared a bankrupt on the petition of the defendant, and that the messenger from the commissioners of bankrupt entered and took the goods by virtue of their warrant, before any assignees were chosen. The replication traversed the bankruptcy within the meaning of the statue. Defendant claimed the right to begin, and cited Cooper vs. Wakley;(c) and per Lord Tenterden: "The rule established in practice is, that when the general issue is not pleaded, and the affirmative of the issue lies on the defendant, he is entitled to begin. I do not say that this is the most convenient rule; I am by no means sure that the practice is founded

(a) R. & M. 293. (b) 3 C. & P. 505; M. & M. 273. (c) 3 C. & P. 474.

on the best principle, but it is established, and I do not think I ought to depart from it."(1)

§ 51. The cumulative effect of Bedell vs. Russell,(*a*) Cooper vs. Wakley,(*b*) and Cotton vs. James,(*c*) seems effectually to overrule the earlier cases of Robey vs. Howard,(*d*) and Lacon vs. Higgins,(*e*) especially when we recollect that all of them, with the exception of Bedell vs. Russell,(*a*) were decided by the same *40 judge. *Besides, however, being classed into liquidated and unliquidated damages, are subject to another division. The plaintiff may, in his declaration, either simply state the wrongful act done by the defendant, and claim damages generally on that account, when as the law presumes that whenever a wrong-

(*a*) R. & M. 293. (*b*) 3 C. & P. 474. (*c*) 3 C. & P. 505. (*d*) 2 Stark. 555. (*e*) 3 Stark. 178.

1. In Chapman vs. Rawson, 8 Q. B. 673; 10 Jur. 287, the case was "trespass for breaking and entering the close of the plaintiff and destroying a dam therein." Plea, that the defendant was possessed of a mill, and that a stream of water of right flowed thereto, and justified the trespass, because the dam was obstructing the flow of the water to defendant's mill. Replication traversing the right of the stream of water. On the trial before Tindal, C. J., at the last assizes for Lincolnshire, Whitehurst, for the plaintiff, claimed the right to begin on the ground that the damages were unascertained. The Lord C. J. asked whether the plaintiff went for substantial damages. Whitehurst stated, that the plaintiff sought to recover some damages for the obstruction of the stream of water. The Lord Chief Justice said his opinion was, that the amount of damages in this case would not be a true criterion of the right to begin. The jury found a verdict for the defendant. Whitehurst now moved for a new trial on the ground of misdirection. [Patterson, J. The rule which my brother Alderson laid down was, that the party against whom verdict would be, if neither gave any evidence, is the party who ought to begin, Amos vs. Hughes; in some cases that is a very good one.] The correct rule has been since laid down in Mercer vs. Whall, 5 Q. B. 447; 9 Jur. 576, that whenever, looking to the record, there is anything to be proved by the plaintiff, he is entitled to begin. Lord Denman, C. J. "The more simple course, perhaps, in that case, would have been to have said, that the affirmative issue was upon the plaintiff to the extent of his damages. The view which the Lord Chief Justice took is a very reasonable one; and, if the counsel for the plaintiff will not undertake to say that the plaintiff seeks to recover substantial damages, the judge must say, that the plaintiff does not proceed for damages, and then the issue is not upon the plaintiff."

ful act has been done, *some* damage has accrued, it will be left to the jury to determine the *quantum* which has necessarily resulted from it in the case before them; and this is called claiming *general* damages.

§ 52. But it frequently happens, that in addition to this general damage, which the law will thus imply, some special mischief has happened to the plaintiff in consequence of the illegal conduct of the defendant, though not necessarily resulting from it, and compensation for which therefore cannot be given by the jury unless expressly claimed in the declaration, and proved by evidence to have occurred;(*a*) and it might be made a question whether, although the onus of proving general damages did not confer a right to begin, as established by the three last cases, the onus of proving *special* damages might not have that effect. This

(*a*) Dixon, J., in Luce vs. Jones, 19 Vr. 709, says: "The true prinelple is, that when personal property, in the actual use of the owner, is injured or taken by a trespasser, so that the owner is deprived of the use of it, the speeial damages necessarily and proximately attendant upon such privation, may, if alleged in the pleadings, be proven to augment the damages beyond the mere value of the thing taken, or the deminution in value of the thing injured," Post vs. Munro, 1 South. 61; Woolley vs. Carter, 2 Halst. 85.

Patterson, J: "I am also of the opinion that the Lord Chief Justice was correct. If damages were not the real matter in dispute, the issue clearly lay on the defendant." Williams and Weightman, JJ., concurred. Rule refused. In Ashton vs. Perkes, 9 C. & P. 231, Patterson, J., said: "There was a case [referring to Burrell vs. Nicholson] where a party brought an action of trespass against the defendant for taking his goods, and the defendant justified under a warrant of distress for a poor's rate. There the plaintiff must, as in the present case, have had to prove the value of the goods; but there it was held that the defendant should begin, the real question in the cause not being the value of the goods, but whether the plaintiff was ratable or not. I shall act upon that case." This was trespass for taking plaintiff's goods. The defendant pleaded, first, as to part of the goods, that he took them as a distress for annuity payable to M. A.; and, second, as to the residue, he justified the taking as a distress for rent due to J. A. Replication to the first plea that the annuity was not in arrier, and to the second *non tenuit*. Defendant was ruled to begin. In an action for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a plea justifying the dismissal upon which issue was taken. *Held*, that the defendant was entitled to begin, Harnett vs. Johnson, 9 C. & P. 206. See *ante* pp. 99, 100.

point was raised in Fish vs. Travers.(*a*) This was an action of trespass for shooting a dog, and the declaration charged certain specific damages to which the plaintiff was put thereby. Defendant pleaded in justification that the dog was accustomed to bite; and claimed the right to begin, citing Cooper vs. Wakley,(*b*) and Cotton vs. James.(*c*) The plaintiff's counsel then contended that the allegation of special damages distinguished this case from those cited, as in them the damage was only consequential, and the plaintiff could have no evidence to give on the subject. But Best C. J. said: "I cannot see any distinction between the two kinds of damages, and the defendant must begin."(*d*)

§ 53. *There, is, however, a case to be found subsequent *41 to the preceding ones, which, if the report of it be correct, and the decision in it a right one, completely overturns the position here sought to be established, viz., that the onus of proving damages does not of itself confer a right to begin. The case alluded to is that of Morris vs. Lotan.(*e*) This was an action of assumpsit for goods sold, &c., to which the defendant pleaded in abatement the non-joinder of several contractors, on which issue was joined.(1) Defendant claimed the right to begin, and cited Cot-

(*a*) 3 C. & P. 578, and affirmed in Belnap vs. Wendell, 1 Fos. (N. H.) 181.
(*b*) 3 C. & P. 474.
(*c*) 3 C. & P. 505.
(*d*) See subject discussed under Case
(*e*) 1 M. & R. 233.

1. This case, together with Fowler vs. Coster, being on pleas in abatement, can hardly be said to contribute anything to the learned author's argument. He has no doubt overlooked their peculiar character which necessarily makes them affirmative pleas independent of damages.

The moment the plea is interposed, the defendant, having by the plea confessed a cause of action, depends upon his plea to keep judgment by default from being taken against him. If he sutains his plea, the judgment is that the suit abate, Larco vs. Clements, 30 Cal. 132. And common sense dictates that this

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A defendant being a tax collector, in trespass for executing his warrant for taking the goods of the plaintiff, who pleads the general issue and files a brief statement in defence, has the right to open and close, Bangs vs. Snow, 1 Mass. 182. Sedgwick, J., said: "The present mode of proceeding is, by the statute, a substitute for special pleading; the defendant takes the affirmative and acknowledges everything the plaintiff has to prove." See Ayer vs. Austin, 6 Pick. 225.

ton vs. James.(*a*) But Denman, C. J., said, that "he recollected being in a case subsequent to that before Lord Tenterden, in which it was decided that the plaintiff should begin unless the damages were admitted. That he was aware of the difference in the decisions, but that his opinion was that the plaintiff should begin."

§ 54. Now here it must be remarked, that as the case alluded to by the Lord Chief Justice is not before us, we can form no judgment as to its applicability to the question under consideration; and as to the case of Morris vs. Lotan (*f*) itself, it cannot be now considered as an authority, for the following reasons.(*b*) First, it was decided by a single judge, and is in express defiance (for to reconcile them seems altogether out of the question) of *four* others, Bedell vs. Russell,(*c*) Cooper vs. Wakley,(*d*) Cotton vs. James,(*a*) and Fish vs. Travers,(*e*) one of which (viz. Cooper vs. Wakley)(*d*) was decided by four judges; and in another (viz., Cotton vs. James)(*a*) the practice on this point was declared by Lord Tenterden to be settled. But if it be said the case of Morris vs. Lotan(*f*) is more recent than those mentioned, and for that reason entitled to the greater weight, it may be observed that the case of Morris vs. Lotan,(*f*) if correctly decided, establishes this, that the onus of proving damages (at least such as are unliqui- *42 dated) *always* confers on the plaintiff a right to *begin; now it will presently be seen, that since the decision in that case the whole fifteen judges have come to a resolution that the practice in this respect required to be *altered*, and that the onus of proving unliquidated damages should, *for the future*, at least in some cases, confer a right to begin; whereas, if Morris vs. Lotan(*f*) were correctly decided, not only would such a rule be perfectly

(*a*) 3 C. & P. 505. (*c*) R. & M. 293. (*e*) 3 C. & P. 578.
(*b*) *Vide* § 89. (*d*) 3 C. & P. 474. (*f*) 1 M. & R. 233.

plea must be disposed of before the merits can be considered; and in case the plea fail, the plaintiff can then require the jury to sit and assess his damages; so it is settled that pleas in abatement are considered as affirmative pleas, Rosco's N. P. 276. See *ante* § 43, p. 102, n. 1, and *infra* §§ 85, 89.

nugatory, but it would follow that *all* the judges had taken an erroneous view of the then existing practice.

§ 55. And should all this be deemed insufficient to destroy the authority of that case it is to be recollected that in another case subsequent thereto, but prior to the new rule, viz. that of Wood vs. Pringle,(*a*) where an action was brought for a libel, to which the defendant pleaded to some parts a justification, and as to the rest suffered judgment to go by default, Lord C. J. Denman himself said, "that as there were parts of the publication on which no issue had been joined between the parties, but judgment had been signed by default for want of a plea; that as to those parts of the case, the plaintiff was entitled to begin by showing the amount of damages he had sustained, and having the right to begin *as to part* he had the general right to begin."(*b*) Now if the case of Morris vs. Lotan(*c*) had been correctly decided, this distinction would have been altogether unnecessary, as the plaintiff, having to prove his damages, would have had the general right to begin as to the whole, notwithstanding the pleas of justification.

§ 56. Rejecting, therefore, the case of Morris vs. Lotan for the above reasons, and collecting together the various points established by the preceding decisions, we arrive at the following general rule, which it is conceived can be supported to its fullest extent, viz.: That with the exception of those cases provided for *43 by the rule of July, 1833, *to be mentioned presently, the mere onus of proving damages, whether nominal or real liquidated or unliquidated, general or special, does not of itself confer on the plaintiff a right to begin, when the onus of proving the facts in issue lies on the defendant."

§ 57. This general principle being established, we will now

(*a*) 1 M. & R. 277.

(*b*) *Vide* § 70, n., and Thurston vs. Kennett, 2 Fost. (N. H.) 159; Buzzell vs. Snell, 5 id. 479. These cases are but the recognition of the common principle that where several pleadings are filed, they are to be tried precisely as if each was pleaded alone; and the admissions, express or implied, in one plea, cannot be used as evidence against the party upon other issues, Cilley vs. Jenness, 2 N. H. 89; Chapman vs. Sloan, id. 467.

(*c*) 1 M. & R. 233.

proceed to consider the rule (1) which was promulgated in the case of Carter vs. Jones,(*a*) by Tindal, C. J., as the result of a resolution which had been come to by all the judges, July 6, 1833. This may be considered as a species of statute law on the subject, for all cases not coming within this new regulation are still governed by the principles above established, Burrel vs. Nicholson,(*b*) Reeve vs. Underhill,(*c*) Lewis vs. Wells,(*d*) Wooten vs. Barton.(*e*) The rule in question was not promulgated by writing, and unfortunately the two reports which we have of this case in which it was first mentioned, although they agree in its general features, yet differ most materially in the extent which they attribute to it.

§ 58. In 6 C. & P. 64, the words of Tindal, C. J., are given thus: "The judges have come to a resolution that justice would be better administered by altering the rule of practice, and that in future the plaintiff should begin in all actions for personal injuries, also in libel and slander, notwithstanding the general issue may not be pleaded and the affirmative be on the defendant. It is most reasonable that the plaintiff who brings his case into court should be heard first to establish his complaint." In 1 M. & R. 281, it is thus: "A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an *44 unascertained *amount, he is entitled to begin, although the affirmative of the issue may, in point of form be with the defendant."

§ 59. Owing to the discrepancy between these reports we must endeavor to collect the extent of the rule from the cases which

(*a*) 6 C. & P. 64; 1 M. & R. 281.
(*b*) 6 C. & P. 202; 1 M. & R. 304.
(*c*) 6 C. & P. 772; 1 M. & R. 440.
(*d*) 7 C. & P. 221.
(*e*) 1 M. & R. 518.

1. This rule has not been adopted in this country, Judge vs. Stone, 44 N. H. 606; 1 Monell's Pr. N. Y. 647; Davis vs. Mason, 4 Pick. 136; Sawyer vs. Merrill, 6 id. 480; Veiths vs. Hagge, 8 Clarke (Iowa) 163. Measuring the damages does not effect the burden, Lees vs. Felt, 11 Ind.; Downey vs. Day, 4 id. 531; Goldsbury vs. Slatterville. 3 Bibb. (Ky.) 345; Smith vs. Sergeant, 67 Barb. 244.

have been since decided in illustration of it; and although it is a matter of regret that those decisions are not by any means uniform, yet it is apprehended that by attentive consideration of them all, and keeping steadily in mind as a principle the propositions established by the decisions already quoted, the difficulties in defining the limits of the rule will be much diminished, if not altogether disappear.

§ 60. First, then, it seems quite clear that this rule does not apply in any case whatever where the damages are either nominal, and the action brought to try a right, or where they are liquidated. This is indeed deducible from the very words of the rule, whichever report of it be viewed as the correct one; but there have been also decided cases bearing directly on the point. In Burrel vs. Nicholson,(*a*) which was an action of trespass for taking goods, to which the defendant pleaded in justification, that he as constable took the goods under a warrant of distress for a poor rate due by the plaintiff, as occupier of a house in the parish of S. M., and plaintiff replied, that the house was not in that parish, the defendant claimed the right to begin, as the affirmative of the issue was on him; to which the plaintiff's counsel replied—the new rule; and per Denman, C. J.: "The rule promulgated by the judges applies to cases where damages are the object of the action, and a justification putting the issue on the defendant is pleaded; there the plaintiff is to begin; but the case here is different, it is a mere question of right, and therefore the defendant must begin, as the affirmative is on him: and this rul-
*45 ing was afterwards confirmed by *the court in banc.(1)

(*a*) 6 C. & P. 202; 1 M. & R. 304.

1. Trespass qu. cl. fr. is local, and can be brought only in a county in which the trespass is committed, Hain vs. Rogers, 6 Blackf. 559; Chapman vs. Doughty, 18 N. J. L. 3; Prichard vs. Campbell, 5 Ind. 494; Chapman vs. Morgan, 2 Greene 374. Where the *locus in quo* is denied specially, the burden is on the plaintiff to prove that it includes the place defendant entered upon, Robinson vs. White, 42 Me. 209; Houch vs. Loveall, 3 Md. 63. See tit. Case.

Where plea of "not guilty" is interposed, parol evidence may be given that the plaintiff was in fact in the possession of the *locus in quo* or that the trespass

§ 61. Again, in Silk vs. Humphrey,(*a*) which was an action of debt for a penalty of £50 brought on 32 G. 2, c. 28, against the defendants, who were sheriffs, and who, as the declaration alleged, having arrested the plaintiff on a *capias*, had unlawfully carried her to prison within twenty-four hours, although she did not refuse to be carried to some safe place of her own nomination; to which defendants pleaded that the plaintiff had consented to be taken to the house of one W. L.; that they offered to allow her to remain there twenty-four hours, but that she requested them to carry her to prison, which they accordingly did; the replication traversed the allegation that the plaintiff had consented to be taken to the house of W. L.; and per Coleridge, J.: "As the plaintiff does not go for unliquidated damages, the defendants should begin."(*b*) The same doctrine seems also supported by the case of Bowles vs. Neale,(*c*) which was an action for a false return to a mandamus, in which defendant alleged that he, as a rector, had deprived the plaintiff of his office of parish clerk, for intoxication, &c., and the declaration negatived successively each of the allegations in the return; the defendant in his plea re-asserted the charges, and issue being joined; per Lord Denman: "Defendant ought to begin, as the affirmative is certainly on him."

(*a*) 7 C. & P. 14. (*b*) See notes 1 & 2 to § 40 *ante*. (*c*) 7 C. & P. 262.

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was committed on some inclosed or cultivated grounds belonging to the plaintiff, Houch vs. Loveall, *supra*; Smith vs. Wilson, 1 Dev. & B. (N. C.) L. 40; still, "not guilty" does not necessarily put the plaintiff's title in issue, Althouse vs. Rice, 4 E. D. Smith 347; Carter vs. Wallace, 2 Tex. 206; but the defendant, under this plea, may always contest plaintiff's title and compel trial of title if he chooses; Child vs. Allen, 33 Vt. 476; yet by denying that the defendant entered the plaintiff's close as described in the plaintiff's writ, he puts the plaintiff's title in issue, Bennet vs. Clemence, 6 Allen 10; so where the complaint alleges plaintiff's title in fee-simple, Hutchinson vs. Chicago R. R. Co., 41 Wis. 541; Ragsdale vs. Goghlke, 36 Tex. 286. Where the defendant justifies by claim of title to the *locus in quo*, he must take the burden, Larne vs. Gaskins, 5 Cal. 164; Rondell vs. Fay, 32 Cal. 354; so if a license to enter, Gambling vs. Price, 2 Nott & M. (S. C.) 138; Hollemback vs. Rowley, 8 Allen, 473; Sawyer vs. Newland, 9 Vt. 383.

§ 62. The above decisions establish that the new rule *does not* extend to any cases where the damages are either nominal or liquidated.(1) The two following show, what indeed also might be collected from the text of the rule, that it *does* extend to all that class of actions *ex delicto* which are brought for any injury or violence to the person or reputation of a party. In Carter vs. Jones,(*a*) the plaintiff brought his action for a libel, to which the

(*a*) 6 C. & P. 641; 1 M. & R. 281.

1. In Cannum et al. vs. Farmer, 2 C. & Kir. 747, sixteen years after the promulgation of the above rule of Carter vs. Jones, 6 C. & P. 65, Alderson, B., said: "I do not agree as to the *principle* as to the substantial or unsubstantial damages; and I think the right cannot depend on whether the plaintiff goes for £100 or for a farthing. I know that Lord Denman has doubts on the subject, in which several of the judges do not agree with him, and that there has been an *arrangement* that in cases of libel, slander and personal injuries, the plaintiff should begin." Again, to show that the rule adopted or the *arrangement* made was never applied to cases of unliquidated damages by the English judges, in Chapman vs. Emden, 9 C. & P. 712, tried seven years after the adoption of the rule, the case was assumpsit by the marshal of the Queen's Bench prison. The declaration stated that in consideration that plaintiff would allow J. W., a prisoner for debt, to reside within the rules, the defendant promised to indemnify the plaintiff from any escape of J. W. That the plaintiff did allow J. W. to reside in the rules, and that he escaped, and the plaintiff was obliged to pay the amount for which J. W. was imprisoned, and other expenses. Plea, that A., the execution creditor, and others, conspired to cause another creditor of J. W. to sue out a bailable writ against J. W., and to cause him, if he should go beyond the rules, to be arrested and detained out of the rules till A. could commence an action against the marshal for the escape of J. W., and that, in pursuance of that conspiracy, a bailable writ was sued out by L., a creditor of J. W., and a warrant granted thereon, upon which J. W. was arrested and detained out of the rules till the marshal was sued for the escape; and that J. W. could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested; and that the plaintiff well knew the premises, and would not plead the same as a defence to A.'s action against him, and would not allow the defendant to defend that action.

Rep ication admitting the writ and warrant, with *de injuria* as to the residue.

Coleridge, J.: "I think that the defendant must begin, and that the plaintiff must give evidence as to the amount of damages afterwards as part of his case. The rule of the judges does not apply to actions of this sort; indeed, as I under-

*46 defendant, instead of the general issue, *pleaded several special pleas which justified the whole of the libel; Tindal, C.

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stand, it does not apply to any cases of contract, though certainly the decisions are not uniform."

Subsequently, on page 734 of the same report, Doe d. Worcester Trustees vs. Rowlands, the action was covenant. The declaration stated that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair. Breaches, that the defendant did not occupy in a proper manner, and did not keep them in repair. Plea, that the defendant did occupy in a proper manner, and did keep the premises in repair. The same learned justice said: "I think that the plaintiffs should begin;" and further said that "the rule of the judges, referred to in Carter vs. Jones, is *not a rule of general application*, but only applies to particular actions, of which this is not one." Upon examining the English cases it will be found that the judges never applied any general rule, except the burden upon the face of the pleadings. A rule based upon the distinction between liquidated and unliquidated damages might be regarded as general, but it would be a complete abandonment of the rule which bases the right to begin on the logic of the pleading which evolves the burden of proof. If, however, we base the right upon the distinction between liquidated and unliquidated damages, and abandon the logic of the pleadings, have we not attempted to lay hold of a tissue that is ever dissolving under examination? Are the above cases, cases for liquidated or unliquidated damages? Is the case of Penhryn Slate Co. vs. Meyer, 8 Daly 62, *ante* § 34, n. 2, a case for liquidated damages? The test as to liquidated or unliquidated damages, mentioned by way of *dicta* in Young vs. Highland, 9 Gratt. 16; Huntington vs. Conkey, 33 Barb. 221; Cox. vs. Vickers, 35 Ind. 27; Balt., &c., R. R. Co. vs. McWhinney, 30 id. 436; Mercer vs. Whall, 5 Ad. & El. (N. S.) 447, can only be applied where malice, oppression, intent, animus, knowledge, deceit, negligence, &c., &c., are either impliedly or expressly in the plaintiff's case as set up, and they are neither admitted or are capable of being admitted, then the plaintiff must begin, as he has at least the burden of one issue, Central Bank vs. St. Johns, 17 Wis. 157; Heineman vs. Heard, 62 N. Y. 454. See tit. Case.

So a defendant has not the right to open and close, in a suit to recover for medical services, when the answer admits that the services were performed, and that the charges were the usual charges for such services, but alleges that by reason of the unskilful and negligent treatment of the plaintiff, he received great damages, Graham vs. Gantier, 21 Tex. 111, as the fact of skilfulness and diligence is involved impliedly in the allegations for services, Billinger vs. Craigue, 31 Barb. 535. The allegation of unskilfulness, &c., is a special plea amounting to the general issue which does not impose the burden on the defend-

J., then promulgated the rule under consideration, and, holding that this was a proper case for its application, allowed the plain-

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ant so pleading, except where it is specifically replied to, so that by admission of the pleading a specific issue is formed, Garrard vs. Willett, 4 J. J. Marsh 628, making it material. For it is held that if a judgment be obtained by a surgeon before a justice for his services to a party, such party cannot afterwards prosecute the plaintiff for malpractice. The question became *res adjudicata* before the justice, though the defendant in that suit first appeared and pleaded the malpractice and afterwards withdrew it, and left the plaintiff to prove his case and take judgment, Billinger vs. Craigue, *supra;* Gates vs. Preston, 41 N. Y. 113;—for the question of malpractice is involved in the issue for services and utterly inconsistent with a judgment for services; and so involved that it cannot be withdrawn from the effects of the adjudication before the justice. Blair vs. Bartlett, 75 N. Y. 150. The court, in Billinger, vs. Craigue, further says: "It is, however, different with the defence called a counter claim, that may be used to sustain as well as to defend an action. It may co-exist with the plaintiff's claim and it is simply a cross-action to enforce a legal or equitable set-off. It admits the plaintiff's demand, but seeks to reduce it or even extinguish it, &c. And I think a defendant always has an election to recoup his damages or wait and bring his suit. It may well be that his damages exceed the plaintiff's demand, and as he cannot split up his claims and use part of it to extinguish the plaintiff's demand, and bring suit for the residue, he ought not be bound to recoup his damages in any case, nor do I think the authorities require it of him, Reub vs. McAllister, 8 Wend. 109. 14 id. 527; Barber vs. Rose, 5 Hill, 76. But where there is no claim on the part of the plaintiff, there cannot strictly and logically be a counter claim. The claim of Billinger, plaintiff in suit for malpractice, in this case does not admit of the defendant's claim, but denies its existence altogether. The two claims cannot co-exist. If Billinger's claim is good, and if judgment had passed in his favor before the suit in the justice's court was disposed of, it would have estopped the defendant from saying that he had performed his contract, and would have barred his action before the justice. This point was decided in the case of Edwards vs. Stewart, in this court. As estoppels are mutual, the converse of the proposition must be held in this case, and I think the point is thus held in Davis vs. Talcott, in the Court of Appeals."

If facts occur after the commencement of an election, of which the defendant desires to avail himself, he must set them up by plea *puis darrien continuance*. If the parties go to trial on the general issue, they are confined to the rights existing at the commencement of the action, Feagin vs. Pearson, 42 Ala. 332, but the plea, &c., waives the general issue, N. Y. Dry Dock Co. vs. M'Intosh, 5 Hill 290, and, no doubt, a trial of one is an abandonment of the other.

tiff to begin.(1) In Atkinson vs. Warne,(*a*) which was an action for false imprisonment, defendant pleaded in justification that he had given the plaintiff in custody for felony; the plaintiff replied *de injuria*, &c., and his counsel claiming the right to begin by force of the new rule, Gurney, B., held that he was entitled to do so.

(*a*) 6 C. & P. 687.

1. A different practice was adopted in Moses vs. Gatewood, 5 Rich. (N. C.) 234; Ransom vs. Christian, 56 Ga. 351. But the rule in the text is adopted in N. Y., not on account of the *resolution* of the English judges, but, although all the allegations of a complaint for libel, except the amount of damages, be admitted, yet the plaintiff will still have the right to open to show malice and *extent* for the injury, even where no special damages have been laid, and malice has not, in terms, been alleged, Opdyke vs. Weed, 18 Abb. Pr. 223; Hecker vs. Hopkins, 16 ib. 301, But if the amount of damages be admitted, the defendant will be entitled to begin, Fry vs. Bennett, 3 Bosw. 290; 28 N. Y. 324.

But is it submitted that the practice of ordering the defendant to begin whenever he justifies the words alleged as defamatory as being true, after the analogy of trials in pleas in abatement, Jewett vs. Davis, 6 N. H. 518; Fowler, vs. Byrd, 1 Hemst. 213, is more in harmony with legal principles, Ransom vs. Christian, 56 Ga. 351, and after the defendant has gone forward and failed, the case on the part of the plaintiff will be considered to be simply to assess the damages.

The consequences of a failure to sustain a plea of justification in these actions, are perilous to the same degree as in abatement, and even more so; for a plea of justification so completely admits the whole cause of action, that the defendant is estopped from offering proof to repel the inference of malice; he must stand or fall by his plea of the truth of the matter charged as libelous, Root vs. King, 7 Cow, 618; Bush vs. Prosser, 11 N. Y. 349; Cooper vs. Barber, 24 Wend. 105. Although, under the code, malice may be rebutted under this justification, yet upon common law principles this defence is only available under a special plea, Barrows vs. Carpenter, 1 Cliff. 204; Hagen vs. Hendy, 18 Md. 177; Terry vs Field, 10 Vt. 353; Bush vs. Prosser, *supra;* Van Benschoten vs. Yaple, 13 How. Pr. 97; Russ vs. Brooks, 4 E. D. Smith 644.

There is no doubt that the defendant may tender an issue upon any fact essential to the plaintiff's case. As that the words alleged were not spoken—that they were not used in an actionable sense—that they were spoken on an occasion, or under circumstances rendering them lawful—that they were pertinent to an issue on trial—Patterson vs. Jones, 8 B & C. 578; McPherson vs. Daniels, 10 id. 272; Lillie vs. Price, 5 Ad. & El. 645; Marsh vs. Ellsworth et als., 50 N. Y. 312; Gilbert vs. Poeple, 1 Denio 41; Hastings vs. Lusk, 22 Wend. 410.

§ 63. So far there can be neither doubt nor difficulty as to the application of this rule; but whether it applies to actions *ex delicto* brought for injuries to property, or to any form of action *ex contractu*, which in either case the damages sought to be recovered are unliquidated and serious, is a matter about which the decisions have been somewhat inconsistent, and which we must endeavor as far as possible to reconcile.

Although many of these defences by authority are admissible under the general issue, yet they are logically pleas in avoidance, Suydam vs. Moffatt, 1 Sandf. 464.

For the purpose of examining the effect of "not guilty," the following classification must be observed:

First. When the words are actionable *per se*, "not guilty" admits the falsehood of the statements upon which the action is based, Thomas vs. Dunaway, 30 Ill. 373; Shuken vs. Collins, 20 Ill. 325, but will operate as a denial of the speaking of the words—speaking them in a defamatory sense—speaking them with reference to plaintiff's office, profession or trade. So accord and satisfaction, Lam vs. Applegate, 1 Stark. 97, the defence of privileged communication, and that, if the occasion of the speaking does not furnish a bar to the action, but only a *prima facie* bar, and casts upon the plaintiff the burden of showing malice in fact, these defences may be given in evidence under the general issue, Lewis vs. Walter, 4 B. & Ald. 605. But it does not of itself put malice in issue, for, by admitting the falsity of the language, malice may be inferred from that alone, Root vs. King, 7 Cow. 613; Usher vs. Severence, 20 Me. 9; Hagen vs. Hendry, 18 Md. 177. Evidence in mitigation may be given under this issue, provided it be such as admits the charge to be false, Cooper vs. Barber, 24 Wend. 105.

Second. When the words are not *prima facie* actionable, "not guilty" operates as a denial of malice, express and general; and the defendant may repel the inferences of malice by showing grounds of suspicion, and in this way prove the truth of the matter spoken or published, Hart vs. Reed, 1 B. Mon. 166; so it will put in issue all facts creating special damages, Wilby vs. Ellston, 8 C. B. 142; Norton vs. Schofield, 9 M. & W. 665. In this class the plaintiff has the burden of showing defamatory sense, express malice, and damages.

Third. Respecting the element of "malice" in privileged communications, the following divisions must be observed:

1. Proof that the communication is privileged in law at all, throws the burden of express malice on the plaintiff, Lewis vs. Walters, 4 B. & Ald. 605; Buddington vs. Davis, 6 How. Pr. 401; Cook vs. Hill, 3 Sandf. 341.

2. Words spoken or written in certain cases of privileged communications are affirmatively authorized, independent of the question of malice and injury; and

In Reeve vs. Underhill,(*a*) which was an action for the non-performance of a contract under seal, to which the defendant pleaded that the deed was obtained by fraud, and issue was joined, defendant claimed the right to begin, as the affirmative lay upon him; to which the plaintiff's counsel replied the new rule, and urged, that as the damages were uncertain and unliquidated, this case came within its provision. But Tindal, C. J.,

(*a*) 6 C. & P. 773; 1 M. & R. 440.

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the moment the circumstances are disclosed, the bar is complete, however maliciously done they are. Of these there are two classes. The former consists of words spoken or written in the legislative proceedings, Rex vs. Lord Abbington, 1 Esp. 226; Rex vs. Creevy, 1 M. & S. 273; Coffin vs. Coffin, 4 Mass. 1. The latter language, used in the course of judicial proceedings, whether by judge, party, counsel, witnesses or juror, if it be relevant to the matter under consideration, and the tribunal either have or may reasonably be supposed to have jurisdiction, Rex vs. Skinner, Loft. 55; Scott vs. Stansfield, L. R., 3 Ex. 220; Seaman vs. Netherclift, 34 L. T. (N. S.) 878; Randall vs. Brigham, 7 Wall. 523; Lawson vs. Hicks, 38 Ala. 279; Rector vs. Smith, 11 Iowa 302; Hastings vs. Lusk, 22 Wend. 410; Jennings vs. Paine, 4 Wis. 358; Calkins vs. Sumner, 13 id. 193; White vs. Carroll, 42 N. Y. 161; Marsh vs. Ellsworth, 50 id. 309; Spooner vs. Keeler, 51 id. 526; Dunham vs. Powers, 42 Vt. 1; Wyall vs. Buell, 47 Cal. 624; and the sole question in such cases is "pertinency," which is matter of law; Marsh vs. Ellsworth, *supra;* Whitely, vs. Adams, 15 C. B. (N. S.) 418.

3. Those *prima facie* privileged are only privileged in the absence of malice, which is for the jury, Cooke vs. Wildes, 5 E. & B. 328; Fowls vs. Brown, 30 N. Y. 20; White vs. Carroll, 42 N. Y. 162; and evidence of falsity of the charge is no evidence of malice, Fowls vs. Brown, *supra*, in these cases.

Under this class are communications based upon information confidently made to the proper authorities to secure the arrest of the offender, Woodward vs. Lander, 6 C. & P. 548; Grimes vs. Coyle, 6 B. Mon. 301; Faris vs. Starkie, 9 Dana 128; Mayo vs. Sample, 18 Iowa 307; what is said at a public meeting, if spoken *bona fide* and without malice, M'Mullen vs. Birch, 1 Binney 178; Smith vs. Higgins, 16 Gray 251; charges made by a member of church regularly to a meeting of the society, Shelton vs. Nance, 7 B. Mon. 128; Coombs vs. Rose, 8 Blackf. 155; such charges made to a lodge, Streety vs. Wood, 15 Barb. 105.

From the above analysis it will further be seen that if the defendant plead affirmatively, order and convenience will be subserved by giving him the opening and closing on the issues which he fixes by his pleas; and if he fail, treat him as a defaulted defendant and assess the damages.

said: "I am of opinion that the present case is not within the rule; that rule applies to actions for libel, words, malicious prosecution, and similar cases. It can hardly be said in any case where the action is for the breach of a special agreement, that the damages are precisely ascertained, but here the amount is after all a mere matter of calculation, and not liable to be increased by any *47 matter that the plaintiff can urge in *aggravation; it is otherwise in actions of libel, slander, and other cases where the action is brought for malicious injuries. I think that the affirmative of the issue being on the defendants, they are entitled to begin."

§ 64. The next case is that of Lewis vs. Wells,(a) and was an action of convenant for not repairing; defendant pleaded several pleas, and in all the issues as ultimately joined the onus probandi lay on the defendant; and per Coleridge, J.: "The old rule was to look at the record, and see on whom the affirmative lay, and I think that the new rule of the judges has not varied it in actions of contract."

§ 65. And again, in the case of Wooton vs. Barton,(b) where the declaration stated that the defendant had covenanted that at the end of a certain term demised by him to the plaintiff, he would re-purchase of the plaintiff the stock, &c., on the premises; to which defendant pleaded that the plaintiff had, by fraud and covin, removed all the valuable part of the stock, and left nothing but worthless goods on the premises, on which issue was joined and the new rule cited; Parke, B., said: "The only rule laid down by the judges was, that in actions for personal injuries where damages are sought, as in actions of assault, &c., and in libel and slander, the plaintiff should begin. The general rule is, that the party on whom the issue is should begin. This was not altered by the resolution of the judges. I shall rule that the defendant is entitled to begin." In addition to these direct authorities, there is another which seems indirectly to support the same doctrine, that the new rule does not, in general, extend

(a) 7 C. & P. 221 (b) 1 M. & R. 518.

to actions *ex contractu*. In Coxhead vs. Huish,(*a*) which was an action for goods sold, &c., with a count for use and occupation of lodgings, to which defendant pleaded as to £20, parcel of the demand, payment, and to the residue a set-off; per Parke, B.: "The defendant must begin."

§ 66. *On the other hand, there are not wanting cases, *48 and very recent ones, too, which tend to show that the onus of proving unliquidated damages in any form of action comes within the new rule, and will entitle the plaintiff to begin. In Harrison vs. Gould,(*b*) which was an assumpsit for breach of promise of marriage, to which the defendant pleaded, that after the promises, &c., the plaintiff had conducted herself in a lewd, unchaste, and immodest manner, and had been guilty of indecent and immoral conduct, defendant's counsel claimed the right to begin, and cited Carter vs. Jones,(*c*) Burrel vs. Nicholson,(*d*) Davies vs. Evans,(*e*) (*infra* § 88,) Warner vs. Haines,(*f*) (*infra* p. 60,) Atkinson vs. Warne,(*g*) Smart vs. Rayner,(*h*) Mills vs. Oddy,(*i*) (*vide* the two last, *infra* § 76,) and Reeve vs. Underhill ;(*j*) the plaintiff, on the contrary, cited the new rule, and argued that it extended to all cases where unliquidated damages were sought to be recovered. [*Note.*—This is not mentioned in the report, but such, I have been informed, was the argument used.] And per Gaselee, J. (after having consulted Lord Abinger, C. B.): "The plaintiff ought to begin."(*k*) And again, in the very recent case of Absolon vs. Beaumont,(*l*) which was an action on a policy of insurance against fire, to which defendant pleaded four pleas, in all of which he took the onus probandi on himself,(1) and claiming the right to begin, cited Carter vs. Jones,(*c*) and Cooper vs. Wakley ;(*m*) but

(*a*) 7 C. & P. 63. (*b*) 7 C. & P. 589. (*c*) 6 C. & P. 640. (*d*) 6 C. & P. 202. (*e*) 6 C. & P. 619. (*f*) 6 C. & P. 666. (*g*) 6 C. & P. 687. (*h*) — 721. (*i*) 6 C. & P. 728. (*j*) 6 C. & P. 773. (*k*) See § 92, n. (*l*) 1 M. & R. 441. (*m*) 3 C. & P. 474.

1. In an action on a life policy to be cancelled in case, by return of premiums, on a plea that the deceased died by suicide and that the premiums were ready to be returned, the defendant is entitled to begin. Starmount vs. Waterloo Life Ins. Co., 1 F. & F. 220.

There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, Terry vs. Life Ins. Co., 1 Dill. 403.

Lord Denman, C. J., said: "In all cases where any affirmative issue, or, to speak more correctly, any affirmative proof lies on the plaintiff to show what damages he is entitled to, he has a right to begin."

§ 67. In order to come to a correct conclusion on the subject, it is to be observed, that the case of Harrison vs. Gould,(*a*) may perhaps after all be reconciled with those which preceded it. They, it is to be remembered, were actions of contract for injuries *49 to property, which outlive the party *wronged, and for which his executors might bring an action, while the case of Harrison vs. Gould,(*a*) was one of the species of actions of contract which works an injury to the feelings, and occasions a personal suffering to the party rather than an injury to his property. It is well known that neither by common nor statute law can actions of this description be brought by executors, (unless some special damage has thereby accrued to the personal estate of the deceased.) They must be brought by the injured person alone, for the wrong done to himself, and in this point of view may fairly be considered *personal* injuries within the meaning of the new rule, while they also seem to partake of the mischievous nature of libel and slander.

§ 68. So that, keeping this distinction in mind, the only authority which goes the full length of asserting that the onus of proving unliquidated damages *always* gives a right to begin, is that of Absolon vs. Beaumont;(*b*) and it is to be remarked, that in that case, if we are to trust to the report, although the new rule was mentioned as having been promulgated in Carter vs. Jones,(*c*) yet not one of the decisions which have since taken place were even alluded to, but the parties contented themselves with citing that case, together with the old one of Cooper vs. Wakley.(*d*) It is therefore but justice to presume that had the cases of Reeve vs. Underhill,(*e*) Lewis vs. Wells,(*f*) Wooton vs. Barton,(*g*) and Coxhead vs. Huish,(*h*) been cited in Absolon vs.

(*a*) 7 C. & P. 580. (*e*) 6 C. & P. 540. (*e*) 6 C. & P. 773. (*g*) 1 M. & R. 518.
(*b*) 1 M. & R. 441. (*d*) 3 C. & P. 474. (*f*) 7 C. & P. 224 (*h*) 7 C. & P. 65.

Beaumont,(a) the decision in this latter would have been very different. As it is, Absolon vs. Beaumont,(a) stands alone, and there are at least *three* decided cases against it, for which reasons, coupled with the others already mentioned, we may venture to disregard its authority on the present occasion.

§ 69. The result, therefore, of all the cases, seems to be, that the new rule does not apply in any case whatever where the damages are either nominal or liquidated.(b) That it extends to all *50 actions *ex delicto* malicious *injury to the person, and to all actions *ex contractu* which die with the person.

It is to be presumed that the defendant, by admitting the amount of damages even in a case coming within the rule, can obtain the right to begin.(c)

§ 70. We have hitherto been considering the case where there is but one issue joined on the record. This, however, is not of universal, or even most common occurrence; and when there are more issues than one arrived at, it not unfrequently happens that the onus of proving some one or more of them lies on one party, and the onus of proving the rest upon the other. It is commonly said, and even laid down in some books, that if the affirmative of any one of the issues lies on the plaintiff, he is entitled to begin and obliged to go through his whole case in the first instance.(1) The latter part of this assertion shall be presently considered; but, with respect to the former, it is obvious that the mere affirmative lying on the plaintiff can possibly make no difference, or give him any privilege; and the rule, as observed in practice, is, "that if the onus of proving any one of the issues lie on the plaintiff, he is always thereby entitled to begin."(d)

(a) 1 M. & R. 441. (b) See pp. 99, 100. (c) See p. 2. n. 4, & pp. 99, 100; see, also, as to admissions to obtain right to begin, p. 92, n. 2. (d) See § 52—(a)

1. Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he is entitled to begin, Rawlins vs. Desborough, 2 M. & Rob. 238; 1 Cr. C. C. 404; 3 Bl. Com. 366; Jackson vs. Pittsford, 5 Blackf. 194; Buzzell vs. Snell, 25 N. H. 474; Belnap vs. Wendell, 21 Id., 175; Chesley vs. Chesley, 37 ib. 279; Huntington vs. Conkey, 33 Barb. 218; Lexington Ins. Co. vs. Paver, 16 Oh. 324; Montgomery vs. Swindler, 32

§ 71. Thus in the case of Wood vs. Pringle,(*a*) which was an action for libel, to which defendant pleaded several special pleas to certain parts of the libel, and suffered judgment by default to the rest, it was held by Lord Denman, that as to those parts of the case on which judgment had been allowed to go by default, that the plaintiff was entitled to begin by showing the amount of his damages; and having the right to begin as to part, he had the general right to begin.

§ 72. Owing to the peculiar nature of the action of *replevin*, *51 *and the circumstances that both parties are, to a certain extent, plaintiffs, it has frequently been attempted to show that the above rule does not apply in that form of action. That attempt, however, has not succeeded; and in the cases of Curtis vs.

(*a*) 1 M. & R. 277.

Oh. St. 7 Rept. 307; Elwell vs. Chamberlain, 31 N. Y. 611. So it is held if there be an affirmative on both sides, Craig vs. Tenn. C. & Mar. 43; Rawlins vs. Desborough, 8 C. & P. 321; Soward vs. Legett, 7 C. & P. 613; but this is only another form of the statement, "if one issue be on the plaintiff he should begin." See *ante* §§ 3, 5, 10 & notes.

The court will not divide the issues, Central Bank vs. St. John's, 17 Wis. 157; so where the plaintiff is not entitled to recover unless he establishes the *bona fide* ownership of certain property in controversy, he cannot be deprived of his right to open and conclude, by reason of the fact that the defendant alleges the plaintiff's title is fraudulent and void—and insists that that raises an affirmative issue on his part, Churchville vs. Lee, 77 N. C. 431.

Under the Code when the whole case is deemed at issue by the reply, it is held, that where the complaint is confessed and avoided and the answer is also confessed and avoided, the defendant has the right to begin and close. Judah vs. Vincennes Univers., 23 Ind. 273.

In equity on the hearing, on bill, crossbill, answers and depositions, both causes being heard together, and both parties having material allegations to sustain, the complainant in the original bill is entitled to open and close, Murphy vs. Stults, 1 N. J. Eq. (Sax.) 560; and the party who objects to a decree and seeks to have it corrected is entitled to open and close the argument, Sills vs. Brown, 1 Johns. Ch. 444; so where a bill is demurred to and dismissed, and the orator appeals to the Supreme Court, the party demurring should open the argument, Bishop vs. Day, 13 Vt. 116.

Wheeler,(*a*) Williams vs. Thomas,(*b*) and James vs. Salter,(*c*) it has been ruled that the principle applies in *replevin* just the same as in other actions; that the onus of proving one issue lying on plaintiff, he has a general right to begin. *Vide* those cases, *infra* § 107.

§ 73. It must, however, be carefully observed, that in order to give the plaintiff a general right to begin, the issue, the onus of proving which lies upon him, must be a real and *bona fide* question between the parties, and not a mere formal or colorable issue on the record. Thus in actions of trespass *quare clausum fregit*, where the plea commences by denying the force and arms, and whatever else is against the peace, &c., and then goes on to state the particular grounds of defence on which the party relies; and, consequently, there are in form two issues joined; in two early cases, Hodges vs. Holder,(*d*) and Jackson vs. Hesketh,(*e*) (*vide* them *supra* § 42,) where the onus probandi on the second issue lay on the defendant, and the plaintiff claimed the right to begin, on the ground that the onus of proving the first, viz., the force and arms, &c., lay upon him, it was held by Bayley, J., "That the not guilty as to force and arms, was not a general issue, and did not throw the burden of any proof on the plaintiff; that it was not inserted with a view to the cause, but to bar the claim of the crown to a fine for trespass, and was quite *dehors* the cause as between the litigant parties;" and he ruled in both cases that defendant should begin.(1)

(*a*) 4 C. & P. 198. (*b*) 4 C. & P 234. (*c*) 1 M. & R. 505. (*d*) 3 Camp. 366. (*e*) 2 Stark. 518.

1. Pleas in bar are in discharge of the action, and every plea must be pleaded to the action. A plea to the damages only are vicious, Smith et als. vs. Applegate, 3 Zab. 352; Demick vs. Chapman, 11 Johns. 132. See Millard et als. vs. Thorn, 56 N. Y. 405; Laramore vs. Wells, 29 Oh. St. 13; Manufact. Nat. B'k vs. Russel, 13 N. Y. Sup. Ct. 375. So all matters of mere evidence, whether the case be at law or equity, and they will be stricken out on motion as irrelevant, Bowen vs. Aubrey, 22 Cal. 566; Cathcart vs. Peck, 11 Minn. 45; Williams vs. Hays, 5 How. Pr. 470; Rennselaer, &c., Co. vs. Wetsel, 6 id. 68; Wooden vs. Strew. 10 id. 48; McAlister vs. Kuhn, 6 Otto 87.

An argumentative plea will be stricken out, Salt Lake City Nat. Bank vs.

§ 74. For the same reason, it has been established by some *52 *recent cases, that when common counts are joined with special ones for the mere purpose of securing a verdict, and no further evidence is intended to be offered in their support besides that relied on in the special counts, the general issue joined on those common counts is not a distinct issue of such a description as to entitle the plaintiff to begin, if the onus probandi on the special counts lies on the defendant.

§ 75. The following are the cases on this subject: In Homan vs. Thompson,(a) which was an action by payee of a promissory note against the maker, with counts for money lent and account

(a) 6 C. & P. 717.

Hendrickson, 11 Vr. 52 · so a replication faulty for duplicity, Stults vs. Buckalew, 4 Dutch. 150; but it is in the discretion of the court to strike out irrelevant or redundant matter, Abbott vs. Striblin. 6 Iowa 191; Buel vs. Lake, 8 id. 151, as it may be regarded as mere surplusage, Murphy vs. Byrd, 1 Hemst. 221; Averill vs. Taylor, 5 How Pr. 476.

After an answer has been stricken out as insufficient, the case stands as upon a default, Robinson vs. Lawson, 26 Mo. 69; North Brunswick vs. Boorean, 5 Halst. 257; but on a motion to strike out a part of an answer as contradictory, evasive, &c., the plaintiff is not entitled to have the whole answer stricken out, Mott vs. Burnett, 2 E. D. Smith 50, yet the adverse party may always be considered as aggrieved by scandalous and impertinent or irrelevant and redundant matter in a pleading. Carpenter vs. West. 5 How. Pr. 53; Williams vs. Hays, id. 470; Putnam vs. DeForest, 8 id. 146.

Pleadings are equally defective, whether improperly pleaded in point of time or point of law; if the former the propriety of the pleading must be tested by a motion to strike out, Price vs. Sinclair, 13 Miss. 254; Whitney vs. Merchants Nat. B'k, 11 Vr. 481; so of a plea contradicting the record or imputing fraud to the court, Middleton vs Ames, 7 Vt. 168; so of a plea conceded to be false, in fact, however good in point of law, Steward vs. Hotchkiss, 2 Cow. 634; Richley vs. Proove, 1 Barn & Cr. 286; and of a paper purporting to be both a plea and demurrer, Coleman vs. Toop, Wright (O) 315; or if it be illegible, Downer vs. Staines, 5 Wis. 159.

A special plea amounting to the general issue may be stricken out, although a demurrer has been made and overruled, Ill. R. R. Co. vs. Johnson, 34 Ill. 389; City vs. Brinkmyer, 12 Ind. 349; Christian vs. Manderson, 2 Pa. 363; Stevens vs. Campbell, 21 id. 471; Grafflin vs. Jackson et als., 11 Vr. 441; Anonymous,

stated; plea to the first count, no consideration (afterwards held the plea would have been bad on special demurrer, but was aided by verdict), and to the two last, non-assumpsit; replication, that defendant had consideration, &c.; and per Parke, B.: "As the bill is admitted the defendant must begin. I held yesterday that if no evidence is intended to be given by a plaintiff on the money counts, the general issue pleaded to those counts will not entitle him to begin, as the object of an opening is to put the jury in possession of the facts you mean to prove by your witnesses. My

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7 Hill 146; the motion to strike out is a substitute for special demurrer, Grafflin vs. Jackson et als, *supra*; Camp vs. Allen, 7 Halst, 1; so it is held that notices of matter stated under the general issue must constitute a defence to the action, or they will be stricken out, Pallet vs. Sargent, 36 N. H. 496, for the law will not allow the general issue restricted, Bush vs. Prosser, 11 N. Y. 351; Wilmarth vs. Babcock, 2 Hill 194; Barber vs. Rose, 5 id. 76; but to have this effect it must be a negative plea, and not an affirmative provable under the general issue, Dibble Pray & Co., vs. Duncan et als, 2 McLean 554. See next note. And these notices do not amount to a special plea, because they admit nothing, Vaughn vs. Havens, 8 Johns. 109. See further on this point, next note.

A plea to the jurisdiction not filed till after a plea to the merits is a nuility, Taylor vs. Hall, 20 Tex. 211; Beitler vs. Sturdy, 10 Pa. 418; so non-assumpsit pleaded to an action on the case, for tort, will be stricken out on motion, Wilkinson vs. Mosely, 30 Ala. 562; but the objection that a traversable fact is stated without a venue in the body of the declaration, goes to a matter of mere form cured by the statute abolishing special demurrers, Reed vs. Wilson, 12 Vr. 29.

But the motion to strike out does not authorize defendant to go back and attack plaintiff's pleadings, Com. Ex. Bank vs. West. T. Co., 15 Abb. Pr. 319; Hogencamp vs. Ackerman, 4 Zab. 133; Salt Lake City Nat. Bank vs. Henderson, 12 Vr. 52.

Under the code a motion to strike out an entire answer as frivolous is irregular. The proper motion is for judgment, Hull vs. Smith, 1 Duer 649; and such motion is in the nature of a summary demurrer (see pp. 18, 88, n. 2), although the statute authorize amendments, Burrall vs. Moore, 5 Duer 654; Livingston vs. Hummer, 7 Bosw. 670; Grubb vs. Remmington, 7 Wis. 349; Freeman vs. Curran, 1 Minn. 169; and it seems unnecessary particularity is no fault under the code, Demithorne vs. Denithorn, 15 How. Pr. 233; Malone vs. Dow. id. 261; Clark vs. Harwood, 8 id. 470.

own impression is that the defendant should begin; but as Gurney, B., held otherwise, I shall act on that precedent in this instance, and consider of the matter with the view of laying down some general rule."

§ 76. Also in Smart vs. Rayner,(*a*) first count, assumpsit by indorsee against acceptor of bill of exchange drawn by A. S.; second count, on another bill between the same parties; third, account stated; as pleas to two first counts, payment of each of the bills respectively, and to the third non-assumpsit; replication traversed the first pleas, and the plaintiff claimed the right to begin, as the general issue was pleaded to the third count; sed per Parke, B.: "Have you (plaintiff) any evidence to give on *53 the *account stated? If not, defendant must begin; the only object of an opening is to state to the jury the evidence that you propose to adduce. If you have no evidence but the bills, defendant must begin." And the plaintiff having no other evidence, the defendant began accordingly. And in the case of Mills vs. Oddy,(*b*) assumpsit, first count for a check drawn by defendant on Bank of England, second count, account stated; plea to first count, no consideration; to second, non-assumpsit; plaintiff replied consideration to first count; and per Parke, B.: "I have considered of this matter since the trial of the case of Homan vs. Thompson, and I think that on these pleadings defendant is entitled to begin."

§ 77. And, lastly, the case of Faith and another vs. M'Intyre,(*c*) first count, assumpsit by indorsees against acceptor of a bill drawn by Brown; second, account stated; plea to the first count, that the bill was accepted for the accommodation of B., and when due that it was in the possession of the plaintiff F. and one W. K. as holders, and that they then held a blank stamped acceptance from Brown intended for the accommodation of G. F. and W. K. as a bill for £500 to the order of the drawer, six months after date; and they, after the bill became due, with consent of Brown, added their names as drawers to the blank acceptance, thereby

(*a*) 6 C. & P. 721. (*b*) 6 C. & P. 728. (*c*) 7 C. & P. 14.

making it a bill for £500 payable to order of G. F. and W. K., which they then negotiated for their own use, and before the commencement of this action the amount of it was paid, and that the same was in satisfaction of the first bill, &c.; second plea, that after the bill had become due, &c., Brown paid £260 in satisfaction; to the second count, not-assumpsit; replication to first plea, *de injuria*, and per Parke, B.: "On these pleadings defendant has a right to begin."(1)

1. See examples on pp. 90, 94, 100. In an action by an indorsee against the maker of a promissory note, he pleaded that the note was in the hands of V., and that while it was so, the claim of V. on it was by an order referred to an arbitrator; and that before any award was made the note was, in violation of good faith, delivered to the plaintiff, and that he, at the time he took the note, had knowledge of all the premises.

Replication, that he had not any knowledge of the premises. *Held*, that the defendant must begin, as the plaintiff's knowledge of the other facts was an essential part of the defence, Smith vs. Martin, Car. & M. 58; 9 M. & W. 304; 1 Dowl. (N. S.) 418.

Where no general denial is interposed, but matter in set-off is set up, and other, affirmative matter, defendant should have the opening and closing, Brown vs. Speers, 20 Ind. 146; and so where an answer admits the allegation of the complaint and pleads a counter claim, and the reply alleges special circumstances negativing the allegations of the counter claim, defendant is entitled at the trial to open and close, Brown vs. Kirkpatrick, 5 S. C. 267.

Special pleas to the "common counts" in assumpsit are bad as amounting to the general issue, 9 Phil. (Pa.) 210. Suppose a motion to strike out the plea of payment had been made in N. Y. Dry D. Co. vs. M'Intosh, 5 Hill 290, *ante* p. 100, n.? So non-assumpsit as to the whole and tender as to part cannot be pleaded together, Chew vs. Close, 9 Phil. (Pa.) 211; the reason is tersely stated by Cowan, J., in The Seneca Road Co. vs. The Anb. & Roch. R. R. Co., 5 Hill 178: "It is highly exceptionable pleading, first, to aver that the plaintiff's cause of action is something other than he has himself made it in his declaration, and then plead to the new case thus fabricated for him. We have often, of late, set aside such pleas summarily, where they first averred that the general counts in assumpsit were intended of a note and then went on to answer the note instead of the counts. With the same propriety might a defendant first frame a count for the plaintiff and then demur." See Anonymous, 19 Wend. 226, and note; Dibble vs. Kempshall, 2 Hill 124; Wilmarth vs. Babcock, id. 194; Sterry vs. Schuyler, 23 Wend. 487.

§ 78. It may seem superfluous to remark, but it has been reported that when a declaration contains a special count, *54 *together with one for an account stated, to which the defendant pleads want of consideration, the plaintiff replies that as to part of the money a good consideration existed, and to the rest of that count, and all the second one, enters a *nolle prosequi*, that the defendant is entitled to begin, Edwards vs. Jones,(*a*) *supra* § 32.

§ 79. Where the issue is on the plaintiff, and he has had notice by the pleadings or otherwise of the nature of the defence to be set up, it was formerly held that he was obliged to go into his whole case in the first instance, and establish, not only his *prima facie* right to recover, but disprove the defence intended to be set up of which he has thus had notice. This was so held by Lord

(*a*) 7 C. & P. 633.

But it will be observed that in actions of assumpsit there are many defences which may be pleaded specially or given in evidence under the general issue; of this character are all such as confess the action (gives express or implied color to plaintiff), and go to discharge the same—and not merely in denial; such as coverture, release, want of consideration, accord and satisfaction, foreign attachment, higher security, payment, &c., Dibble, Pray & Co. vs. Duncan et als., 2 McLean 554; Armstrong vs. Webster, 30 Ill. 333; and these pleas should conclude with a verification; for those that must conclude to the country are obnoxious as pleading specially what amounts to the general issue. Wilkes vs. Hopkins et als., 6 Man. & Gr. 36. *Ante* pp. 24. 88.

So, in an action of debt for goods sold, defendant pleaded coverture. Replication denying coverture; the defendant must begin if there be no other pleas, Woodgate vs. Potts, 2 Car. & Kir. 458; the same when the action was on a promissory note, Cannam vs. Farmer, id. 747; and if there be a bill of particulars, and there be an express admission at the trial of the amount claimed in the bill, and the pleas be affirmative only—even though the claim be for unliquidated damages—the defendant should begin, Roscoe's N. P. 276, citing Tindall vs. Baskett, 2 F. & F. 644; Bonfield vs. Smith, 2 M. & R. 519.

But it is only on the ground that the admission appears on the record that the defendant can claim the right to begin, without expressly making the admission, Blacklodge vs. Pine, 28 Ind. 466; Goodpaster vs. Vooris, 8 Iowa 344; without the bill of particulars or express admission the plaintiff should proceed as for unliquidated damages, Hayward vs. Radcliff, 4 F. & F. 500.

Ellenborough, in the case of Rees vs. Smith,(*a*) and it is said that he generally, at *nisi prius*, adopted the practice.(*b*) That case was an action of tresspass for breaking into the plaintiff's house and seizing his goods, to which defendant pleaded, first, the general issue; second, a fraudulent removal of the goods to avoid a distress for rent. The plaintiff at first proved the trespass; defendant then gave evidence in support of his plea; after which the plaintiff offered general evidence to negative the supposition of a fraudulent removal; but Lord Ellenborough said, that when the defence is known, either by pleading or notice, the plaintiff is bound to open the whole case in chief.(*c*)

§ 80. That if any one fact be adduced by the defendant to which an answer could be given, the plaintiff should have an opportunity given him to do so; but that this should be understood of a specific fact: that he could not go into general evidence, in reply to the defendant's case, that there was no instance in which the plaintiff was entitled to go into half his case and *55 reserve the remainder. *This doctrine, however, has been since abandoned. Lord Chief Justice Abbott adopted a contrary course, and allowed the plaintiff to give evidence in answer to a defence in an action on a bill, that there was no consideration after notice of the intended defence.(*d*)

§ 81. And, as Mr. Starkie justly observed, "it is possible that the defendant may not be able to establish any case and thus time may be saved by postponing the plaintiff's reply;(1) besides, until

(*a*) 2 Stark. N. P. C. 30. (*b*) 1 Stark. Ev. 382. (*c*) No such practice obtains generally in this country. See § 31, n. 1. (*d*) 1 Stark. Ev. 382.

1. The observations of Mr. Starkie illustrate the rule adopted in this country. The plaintiff must not content himself by showing a *prima facie* right to recover only, but must introduce all his testimony to sustain the issue containing the right to recover, so that the jury can see from the whole case that the plaintiff is so entitled. The burden at the trial does not shift from side to side as a mere *prima facie* case is developed by either, but all the testimony on the plaintiff's affirmatives should be introduced together, Heineman vs. Heard, 62 N. Y. 454; Lamb vs. Cam. & Amb. R. R. Co., 46 N. Y. 271; but not to dispute the defence intended to be set up, *vide supra* § 31, n. 1.

the defendant has adduced such evidence, it cannot be known with any certainty to what points the plaintiff is to adduce his evidence in reply, and that the whole subject seems to be a matter of practical convenience, subject to the discretion of the judge at *nisi prius*." In the first case that occurred since the new rule of the judges above mentioned, that of Carter vs. Jones,(*a*) which was an action for libel, to which all the pleas were in justification, and the onus probandi on the defendant; by force of the new rule the plaintiff was called on to begin, he did so, and went into his whole case: but this, it should seem, was optional—not compulsory.

§ 82. But he will not be allowed in his opening to give a portion of the evidence he may possess in reply to the defendant's case, and reserve the rest till the defendant has concluded. Thus in Browne vs. Murray,(*b*) which was an action for a libel, to which defendant pleaded the general issue and several pleas in justification, and the plaintiff, after proving the publication, called a witness to disprove certain facts alleged in the justification, and after the defendant had closed his case proposed to call another to disprove others of those facts, Abbot, C. J., said: "The plaintiff, in actions of this nature, may, if he thinks fit, content himself with the proof of the libel, and leave it to the defendant to make out *56 his *justification; and the plaintiff may, in reply, rebut the evidence produced by the defendant.

(*a*) 6 C. & P. 64 (*b*) R. & M. 254

And wherever the defendant traverses and also specially justifies, the plaintiff should reserve his case on the special pleas until the defendant has proved them; for if the plaintiff elect to enter into disproof of them in the first instance, he will not be allowed to give further evidence of the same kind in reply. The plaintiff is entitled to reserve his answers to defendant's case, although his witnesses have been cross-examined so as to disclose the nature of the defence relied on, Shaw vs. Beck, 8 Ex. 392; Goss vs. Turner, 21 Vt. 437.

Both parties are bound by the view of their respective cases taken by their counsel at the trial, and the mode of conducting them, and they cannot move for a new trial upon grounds neglected or omitted to be urged at the trial at *nisi prius*, Doe d. Gord vs. Needs, 2 M. & W. 129; Hen. vs. Nicks, 3 Dowl. 163 Short vs. Galloway, 11 Ad. & E. 28; Hasler vs. Carpenter, 3 C. B. (N. S.) 172.

§ 83. "But if the plaintiff in the outset thinks fit to call any evidence to repel the justification, then I am of opinion that he should go through all the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply; otherwise there would be no end to evidence on either side." And in Sylvester vs. Hall,(*a*) which was an action of trespass and false imprisonment, with the general issue and plea in justification, the same rule was laid down by the same judge. *Vide*, also, Williams vs. Davies.(*b*)(1)

(*a*) R. & M. 255, n. (*b*) 1 Cr. & M. 465.

1. In Williams vs. Davies, *supra*, the action was assumpsit on several bills of exchange with common counts. The defendant pleaded *non-assumpsit*, the statute of limitations, and a set-off. At the trial before Lord Lyndhurst, C. B., at the Middlesex sittings, after last Michaelmas term, the plaintiff, in the first instance, proved a sum of 22£. 6s. 8d. to be due to him from the defendant, and said that he had documents to prove a larger sum to be due, which he should not put in, unless the defendant proved his set-off. Chilton, for the defendant, insisted that the plaintiff was bound to prove his whole demand in the first instance, and had no right to go into evidence, in reply, having in part met the defendant's case. The defendant then proved his set-off to a larger amount than the plaintiff had proved. In answer to the defendant's case, plaintiff proposed to prove two bills of exchange which he had accepted for the defendant's accommodation, and had paid; and the learned judge, having allowed him to do so, a verdict was found for the plaintiff. Chilton now moved for a new trial on the ground, amongst others, that the evidence in reply had been improperly received, and that it was too late after the plaintiff had closed his case to give evidence of demands which he had not made part of his case in the first instance. He relied upon Rees vs. Smith, 2 Stark. N. P. 31, where Lord Ellenborough states the rule to be that when, by pleading or by means of notice, the defence is known, the counsel for the plaintiff is bound to open the whole of the case in chief—he cannot proceed in parts; that when it is known what the question in issue is, it must be met at once. He also cited Brown vs. Murry, R. & M. 254, where Lord Tenterden held that in an action for a libel, where the general issue was pleaded and also a special justification, the plaintiff might, in the outset, give all the evidence he intends to give to rebut such justification, or he might do so in reply to evidence produced by the defendant, but that he was not entitled to give part of such evidence in the first instance, and to reserve the remainder for a reply to the defendant's case.

Lord Lyndhurst, C. B.: "The consequence would be that the plaintiff might

§ 84. Having thus explained the general principles by which the question of the right to begin is to be determined, we now proceed to give a general summary of their application to various forms of civil proceedings; and first of the right to begin when issue is joined on pleas in abatement; and here it is to be remarked that all pleas in abatement are not similar in form; in some the affirmative lies on the plaintiff, and, in others, on the defendant, and there can be no possible reason for supposing that any difference exists between them and pleas in bar, so far as the onus probandi and right to begin are concerned; many of the cases above quoted were of the former class, and there can be no doubt that both are governed by the same general principle, namely, that the party on whom the onus probandi lies has a right to begin, except in those cases provided for by the rule of July, 1833.(*a*)

§ 85. Where a plea in abatement is for the nonjoinder of a person who ought to have been made *defendant*, although there are some irreconcilable decisions to be found on the subject, yet the weight of the authorities, and the reason of the thing show that the onus probandi and right to begin are with the defend-
*57 ant. The authorities which seem in *favor of the contrary opinion are these: In Young vs. Bairner,(*b*) which was an action of assumpsit for work, &c., in repairing a ship of which the defendant was owner, defendant pleaded that he was joint owner together with others named in the plea, to which the plaintiff replied that the defendant had undertaken *solely* to pay, on which issue was joined. Here the plaintiff began, but the question does not appear to have been raised. In Stansfield vs. Levy,(*c*) which was assumpsit for goods sold, to which the defendant pleaded

(*a*) See tit. Case. (*b*) 1 Esp. 103. (*c*) 3 Stark. 8

have to go into proof of many years' transactions when it would be quite unnecessary to the claim which he made. Either of the two ways of proceeding may be correct; and it must be left to the discretion of the judge to admit the evidence or not; and if ultimately the evidence is received, it cannot be complained of. "The better rule is to adhere to the practice laid down in § 31, n. 1."

that the contract, if any, was made jointly with himself and one C., on which issue was joined, the plaintiff began without opposition. And in Hare vs. Munn,(a) which was assumpsit for money lent, to which defendant pleaded the nonjoinder of one hundred and sixty-three persons named in the plea, Lord Tenterden allowed the plaintiff to begin.

§ 86. In answer to these it may be said, first, that in the case of Young vs. Bairner,(b) the plaintiff was clearly entitled to begin, because his replication, instead of taking issue on the fact of the joint ownership, alleged that the defendant had undertaken solely to pay, thus clearly taking the onus probandi on himself, so that this case is not in point. That as to Hare vs. Munn,(a) Lord Tenterden, in the case of Fowler vs. Coster,(a) decided the very next day, when Hare vs. Munn was alluded to, said, that in that case he allowed the plaintiff to begin only because he thought, from the statement of the evidence about to be adduced, that it would be more convenient to take it in the first instance, but that he did not on that occasion lay down any general rule; and in the same case of Fowler vs. Coster,(a) which was an action of assumpsit by an indorsee against the acceptor of
*58 two bills of exchange, to which defendant *pleaded that the promises, if any, were made jointly with one C., on which issue was joined, Lord Tenderden held that the defendant was entitled to begin.

§ 87. So that the only authority which seems to establish the plaintiff's right to begin in this class of cases is that of Stansfield vs. Levy,(c) where, however, the question was not directly raised, and to which may be opposed not only the case of Fowler vs. Coster, above mentioned, but the following. In Passmore vs. Bousfield,(d) which was an action of assumpsit on an attorney's bill, to which was pleaded that several persons named in the plea ought to have been joined as co-defendants, on which issue was joined, and the defendant began without discussion; and in the case of Morris vs. Lotan,(e) which was an action of assumpsit for

(a) 1 Esp. 353. (b) 1 M. & M. 241. (c) 3 Stark. 8. (d) 1 Stark. 296. (e) 1 M. & R. 338.

goods sold, to which the defendant pleaded the nonjoinder of several contractors, it was held by Denman, C. J., that the defendant was entitled to begin, (*i. e.*, after admitting the damages.) For the authorities against which position, *vide supra.*(*a*)

§ 88. But where the defendant pleads in abatement the nonjoinder of a person who ought to have been made a *plaintiff* in the suit, the rule seems different; and it certainly appears that the onus lies on the plaintiff, as he, by traversing the fact that the promises were made to him and another person, undertakes to establish that he has in himself alone a complete right of action. There is at least one case in the books which bears out this position: it is that of Davies vs. Evans,(*b*) which was an action of assumpsit for work, &c., in repairing a road, to which the defendant pleaded that the promises had been made to the plaintiff and one J. S., and not to the plaintiff alone, on which issue was joined; and the plaintiff's counsel argued that the defendant *59 *ought to begin, as the affirmative lay on him. Said per Parke, B.: "I am of opinion that the plaintiff ought to begin."(1)

§ 89. If, in addition to these authorities, we try the question by the two tests mentioned in the last chapter, which were given by Alderman, B., in the cases of Amos vs. Hughes (*c*) and Mills vs. Barber,(*d*) (*supra* p. 18,) we shall arrive at the same result. Suppose in Davies vs. Evans (*b*) no evidence at all had been given, who must have succeeded? The defendant; because the plaintiff had, by his replication, undertaken to show *a right of action in himself alone;* and when the nonjoinder of a co-defendant is pleaded, supposing no evidence to be given, the plaintiff must suc-

(*a*) It is submitted that these cases, as exhibited, show nothing but special pleas amounting to the general issue. See p. 86, n. 1. They were general issue because they were not technically pleaded as such. See § 89, n. 1.

(*b*) 6 C. & P. 619.
(*c*) 1 M. & Rob. 464
(*d*) 1 Mees. & Wels. 63.

1. This conclusion is simply erroneous. Pleas in abatement are affirmative pleas, and the defendant who pleads them has the onus, and for this reason has the right to begin, Jewett vs. Davis, 6 N. H. 518; Shepard et al. vs. Graves, 14 How. 505, 512; Fowler vs. Coster, 3 C. & P. 463; Fowler vs. Byard, 1 Dorset. 213. See next note.

ceed, as the promises are admitted to have been made by the defendant, who only alleges that another person ought to have been joined with him; therefore, according to the first of those tests, the plaintiff should begin in the first case, and the defendant in the second, which agrees with the authorities. And if the question be submitted to the second of those tests, viz., that given in Mills vs. Barber,(*a*) a similar result will be arrived at.(1)

(*a*) 1 Mees. & Wels. 425.

1. The learned author has misinterpreted the case of Davis vs. Evans It contained no plea in abatement. The plea was a feint at a special plea in bar, but in fact it was the general issue and nothing more. The matter might have been pleaded in abatement; and because it was not technically pleaded in abatement, it was treated as it ought to have been, as plea in bar, Banks vs. Lewis, 4 Ala. 599. Whether it be abatement or bar is to be known by its conclusion, Jenkins vs. Pepoon, 2 Johns. (N. Y.) Cas. 312; Schoonmaker vs. Elmendorf. 10 Johns. 49. The plea must conclude with a verification, and the replication thereto must conclude to the contrary, Morrow vs. Huntoon, 25 Vt. 9; (see p. 11;) Wilkes vs. Hopkins et al. So a plea in the form of a plea in bar which sets up matter that can only operate in abatement may be treated as a nullity, Robinson vs. Fisher, 3 Cai. (N. Y.) 99; and although it conclude in abatement, it may be demurred to as a plea in bar, Hargis vs. Ayers, 8 Yerg. (Tenn.) 467; and if it be defective it may be stricken out on motion.

In general, pleas in abatement are not favored. As they do not deny the merits of the plaintiff's claim, but merely delay his remedy, they are not aided by any intendments. They must be framed with entire certainty and accuracy, and all doubtful points will be construed against the pleader. Correctness of form is matter of substance, and any defect of form is fatal to the plea, Anonymous, 1 Hemst. 215; Townsend vs. Jeffries, 24 Ala. 329; Roberts vs. Heim, 27 Ala. 678; Moss vs. Ashbrook, 12 Ark. 369; Mandell vs. Peet, 18 Ark. 236; Thompson vs. Lyon, 14 Cal. 39; Larcoe vs. Clements, 36 Cal. 132; Wadsworth vs. Woodford. 1 Day 28; Parsons vs. Ely, 2 Conn. 377; Clark vs. Warner, 6 Conn. 355; Haywood vs. Chestney, 13 Wend. 495; Fowler vs. Arnold, 25 Ill. 284; Hazzard vs. Haskell, 27 Me. 549; Barnham vs. Howard. 31 Me. 569; Beldin vs. Laing, 8 Mich. 500; Prosky vs. West, 16 Miss. 711; Ellis vs. Ellis, 4 R. I. 110; Settle vs. Settle, 10 Humph. 505; Pearson vs. French, 9 Vt. 349.

The author quaintly asks: "If no evidence had been given in Davis vs. Evans, who must have succeeded?" The answer must be determined by the issue on the record. See p. 11, n. If the matter pleaded be in abatement and the plea be in bar, no answer can be given, for there is no issue, Robinson vs. Fisher,

§ 90. From the consideration of pleas in abatement we pass on to consider the application of the general principles above established, when issue is joined on a plea in bar. And, first, it may be laid down, that in almost all species of assumpsit the new rule does not apply, and the party begins on whom the onus probandi is cast by the record.(1) Most of the cases decided relative to this form of action have been elsewhere noticed in differ-

1. Assumpsit is technically an action on the case, Carter vs. White, 32 Ill. 509, as damages alone are the object of the action. It lies concurrently with debt on all the usual money demands, Mahaffey vs. Petty, 1 Ga. 261; Moses vs. McFerlan, 2 Burr. 1008; Spratt vs. McKinney, 1 Bibb. 595; Brooks vs. Scott, 2 Munf. (Va.) 341; 8 Gill & J. 333; the amount claimed being liquidated, Rann. vs. Hughes, 7 T. R. 351; Ruder vs. Price, 1 H. Bla. 547. The distinguishing feature between assumpsit and debt is, that in the former action the gist is laid on

supra, except that the case stands on default. The case is so meagerly reported, it is impossible to tell what view the court took of the plea; but if it was in fact technically pleaded in abatement, it was an affirmative plea on authority, and defendant was entitled to begin. See authorities above. But the matter was available under the general issue, as it is well-settled law, that the objection that there are too many or too few parties plaintiff, in action *ex contractu*, may be taken either by plea in abatement or as ground of non-suit at the trial under the general issue. Snell vs. Deland, 43 Ill. 323; Harlem vs. Emert, 41 Ill. 320; Ulmer vs. Cunningham, 2 Me. 117; Waldsmith vs. Waldsmith, 2 O. 156; Glover vs. Honeywell, 6 Pick. 222; Robinson vs. Scall, 3 N. J. L. 817; Scott vs. Patterson, 1 A. K. Marsh 411.

We have already seen, in numerous instances in these notes, that special pleas, amounting to the general issue *only*, do not give the defendant the right to begin, for the reason that they do not admit enough. They must always admit the capacity of the plaintiff, so as to relieve him of proof; but this plea denied it directly, by alleging a joint interest, which merely negatived plaintiff's right to recover. See p. 11, n.

Proper parties plaintiff are so necessary an element in the plaintiff's right to recover, that if this defect appears on the face of the declaration it is cause for arresting or reversing for error, Dob vs. Halsey, 16 Johns. 40; Howard vs. Wilcox, 47 Pa. 51, or sustaining a demurrer, Blakely, vs. Blakely, 2 Dana 460; Sims vs. Harris, 8 B. Mon. 55; Stevens vs. Cofferin, 20 N. H. 150.

In Condit vs. Neighbor, 13 N. J. L. 83, the court says: "The demurrer is well taken if the claim of the plaintiff, as exhibited in the declaration, is more comprehensive than his right."

ent parts of this treatise. *Vide* Young vs. Bairner,(*a*) § 25; Passmore vs. Bousfield,(*b*) § 87; Robey vs. Howard,(*c*) § 43; Stansfield vs. Levy,(*d*) § 85; Calder vs. Rutherford,(*e*) § 4; Lacon vs. Higgins,(*f*) § 43; Hare vs. Munn,(*g*) § 85; Fowler vs. Coster,(*h*) *60 § 46; Thwaites vs. *Swainsbury,(*i*) § 37; Morris vs. Lotan,(*j*) § 34; Davies vs. Evans,(*k*) § 88. Subsequent to all of which was decided Warner vs. Haines,(*l*) which was an action of assumpsit

(*a*) 1 Esp. 103. (*b*) 1 Stark. 295. (*c*) 2 Stark. 555. (*d*) 2 Stark. 8. (*e*) 3 B. & B. 302. (*f*) 3 Stark. 178. (*g*) 1 M. & M. 241. (*h*) 1 M. & M. 241; 3 C. & P. 463. (*i*) 5 C. & P. 69. (*j*) 1 M. & R. 233. (*k*) 6 C. & P. 619. (*l*) 6 C. & P. 717.

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the word "promised," and in the latter "agreed," Cruckshank vs. Brown, 10 Ill. 75; McGinnity vs. Languerenne, id. 101. This is, no doubt, one of the tests the author refers to in § 46, *ante*, where the plaintiff is entitled to recover the amount stated in the declaration, or none at all." It is submitted that in all actions of assumpsit the party who, without introducing any evidence, is liable to have judgment for nominal damages rendered against him, has the right to begin, and such questions as measures and assessment of damages, proof of value, &c., are in natural and logical order introduced with evidence in reply to defendant's case or affirmative plea, Harnett vs. Johnson, 9 C. & P. 206; Ashton vs. Perkes, id. 231; Chapman vs. Emden, id. 712; Hill vs. Fox, 1 F. & F. 136; Overburg vs. Muggrige, id. 137; Cotton vs. James, 3 C. & P. 505; Cooper vs. Whately, id. 474; Viele vs. Germania Ins. Co., 26 Iowa 9; McLees vs. Felt, 11 Ind. 218; Patton vs. Hamilton, 12 Ind. 256; N. Y. Dry D. Co. vs. M'Intosh, 5 Hill 290; *ante* § 34, n. 2. So Cannan et al. vs. Farmer, 2 Car. & K. 746; Woodgate vs. Potts, id. 458; Bonfield vs. Smith, 2 M. & R. 519 are authorities that affirmative pleas to the common money counts admit the amount claimed in the plaintiff's particulars of demand. See, also, where particulars are declared on with notes evidently for the same consideration for which the notes were given. See, further, Cox vs. Vickerf, 35 Ind. 27; Baltimore, &c., R. R. Co. vs. McWinney, 36 id. 436; Brenau vs. Security Ins. Co., 4 Daly 296. It may be laid down as a general principle that upon a breach of a valid contract the party complaining is entitled to some damages, although it may be difficult to ascertain the amount, and they may be nominal only, Devendorf vs. Wert, 42 Barb. 227; Fitch vs. Fitch, 3 J. & Spr. 302; Boorman vs. Brown, 3 Q. B. 515; Marzetti vs. Williams, 1 Barn. & Ad. 415; Owen vs. O'Reilley, 20 Mo. 603; Dye vs. Mann, 10 Mich. 291; as if an agent violate instructions, although no actual damage be shown, nominal damages will be awarded, Frothingham vs. Everton, 12 N. H. 239; and so if a sheriff neglect his duty, although no actual damage arise. Glezen vs. Rood, 2 Metc. 490; Bruce vs. Pettengill, 12 N. H. 341.

by indorsee against the acceptor of a bill of exchange drawn by T. S. on defendant, and indorsed to plaintiff, and also on an account stated; to which defendant pleaded, first, to the first count, that the bill was accepted for a debt due from defendant to T. S., at the time of the discharge of the defendant under the insolvent debtors' act, of which the plaintiff had notice, and that after the acceptance the defendant was discharged by the Insolvent Debtors' Docket from the debt for which the bill was accepted. Second plea to first count, that the defendant was indebted to T. S., and was a prisoner for debt in the Fleet, and had petitioned the court for his discharge, when T. S. threatened to oppose his discharge; to prevent which he accepted this bill, whereof at the time of the indorsement the plaintiff had notice; that defendant was afterwards discharged as an insolvent debtor; and to the account stated he pleaded the general issue; the replication to

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The plea of the general issue puts the plaintiff upon the proof of his whole case, and entitles the defendant to give evidence of anything which shows that the plaintiff *ex equo et bono* ought not to recover, Falconer vs. Smith, 18 Pa. 130; Heck vs. Shener, 4 Serg. & R. 249; *ante* p. 96.

Special pleas in this action must admit the contract as stated in the declaration, and show either a performance by the defendant or facts which in law excuse or justify the non-performance of it. ? 76, *ante*; Dibble vs. Duncan, 2 McLean 553.

If the plea deny the contract as declared on argumentatively or inferrentially, the plea amounts to the general issue, *ante* pp. 24, 88, for, so far from confessing the contract, it denies it. Armstrong vs. Webster, 30 Ill. 333; Goodrich vs. Reynolds, 31 id. 490.

So where to an action for work, labor and materials, the defendant pleaded that by agreement the amount was to be taken in malt and beer, and that he was always ready and willing to deliver such malt and beer to the plaintiff; this was held bad, as amounting to the general issue, for it denied the contract stated in the declaration. Collingbourne vs. Mantell, 5 Mees. & W. 289; Dicken vs. Neale, 1 id. 556; Cleworth vs. Pickford, 7 id. 314; Morgan vs. Pebrer, 3 Bing. (N. C.) 457. Lyall vs. Higgins, 4 Q. B. 528; and wherever the plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad as amounting to the general issue, although, in truth, it only set out what was the actual agreement between the parties, Nash vs. Breeze, 11 Mees. & W. 352; Williams vs. Vines, 1 Dowl. & L. 710. See, further, *ante* p. 133.

the first and second pleas traversed the notice, and issue joined; and per Lord Denman: "Defendant must begin and prove the notice."

§ 91. *Vide*, also, subsequent to this case, those of Homan vs. Thompson,(*a*) Smart vs. Rayner,(*b*) Mills vs. Oddy,(*c*) and Faith vs. M'Intyre,(*d*) p. 52, 53. Next comes that of Baker vs. Malcomb,(*e*) which was assumpsit by indorsee — acceptor of a bill of exchange, to which the defendant pleaded, that the bill had been altered after acceptance, without consent of the acceptor, by changing two months into five months.(1) Sed per Tindal, C. J.: "Defendant ought to begin." *Vide*, next, Amos vs. Hughes,(*f*) § 5, and Coxhead vs. Huish,(*g*) § 65. Then comes Richardson vs. *61 Fell,(*h*) which was an action *for money lent, to which the defendant pleaded payment. The under-sheriff allowed the defendant to begin; and per Coleridge J. (in the Bail Court): "He was right in so doing." And, lastly, *vide* Shilcock vs.

(*a*) 6 C. & P. 717. (*c*) 6 C. & P. 728. (*e*) 7 C. & P. 101. (*g*) 7 C. & P. 63.
(*b*) 6 C. & P. 721. (*d*) 7 C. & P. 44. (*f*) 1 M. & Rob. 464. (*h*) 4 Dowl. Pr.

1. In all written contracts *inter vivos* in which alterations or interlineations appear, about which alterations and interlineations there is nothing suspicious, which is a question of law, Sirrine vs. Briggs, 31 Mich. 445, the presumption is that they were made before the execution, and the burden of proving they were made after falls on the assailant, and the question then goes to the jury, Jourden vs. Boyce, 33 Mich. 302; Little vs. Herndon, 10 Wall. 31; Milliken vs. Marlen, 66 Ill. 13.

As to negotiable paper, it appears that the law makes no presumption, but leaves the question of prejudicial alteration to be determined by the jury on all the evidence of the case, though when such alteration is apparent, and if favorable to the party offering the note, then he must bear the burden of the explanation, Taylor vs. Mosely, 6 C. & P. 273; Carris vs. Tattershall, 2 M. & Gr. 890; Knight vs. Clements, 8 A. & E. 215; Wilde vs. Armsby, 6 Cush. 314; Hunt vs. Gray, 35 N. J. L. 227; Morris vs. Bowman, 12 Gray 467; and where the alteration is *prima facie* unlawful, the burden that it was lawfully made is upon the holder, Hill vs. Cooley, 46 Pa. 259; Smith vs. U. S., 2 Wall. 219.

Lines drawn across a bond or note raises a presumption that it has been satisfied, Pitcher vs. Patrick, 1 Stew. & Port. (Ala.) 478; and an entry of credit on a note which is erased is evidence of payment unless disproved. Graves vs. Moore, 7 T. B. Mon. 341.

Passman,(*d*) § 8, Smith vs. Davies,(*e*) § 9, and Edwards vs. Jones,(*f*) § 32.

§ 92. We have, however, already seen, in the case of Harrison vs. Gould,(*a*) *supra* § 66, that in an action of assumpsit for breach of promise of marriage, the plaintiff has always a right to begin by virtue of the new rule.(1)

In actions on the case the new rule requires to be particularly attended to.(2) In such of them as are brought for libel or slan-

(*d*) 7 C. & P. 291. (*e*) 7 C. & P. 307. (*f*) 7 C. & P. 663 (*a*) 7 C. & P. 580

1 Ten years after the new rules were adopted, *supra* § 57, it was ruled that "If in an action for the breach of promise of marriage the defendant plead that, before any breach of the promise the parties mutually agreed to exonerate each other from their promise, and this be denied by the replication, the defendent is entitled to begin." Plaintiff's counsel insisted that he was going for heavy damages, and on the authority of Carter vs. Jones demanded the right to begin, admitting also that the proof of the issue lies on the defendant. Lord Abinger, C. B., said: "We think that in this case the defendants have the right to begin." Stanton vs. Paton and wife, 1 Car. & Kir. 148.

A man is not bound by contract to marry a lewd woman entered into in ignorance of her character. Vantorch vs. Griffin, 78 Pa. 504; nor by an agreement to marry when a divorce should be decreed between himself and wife, in a suit then pending, it being contrary to public policy, and void, Noice vs. Brown, 38 N. J. L. 228: Paddock vs. Robinson, 63 Ill. 99; so a party may plead his own impotency successfully, Gulick vs. Gulick, 12 Vr. 13.

It is submitted that these propositions are sufficient for the foundation of an affirmative plea of confession and avoidance, so as to give the opening to the pleader, and particularly so under the codes which have abolished the general issue.

2. As the "rule" (*ante* p. 114 & n.,) or "arrangement" (*ante* p. 117 n.), or "not a rule of general application," (on p. 118 & n.,) has not been adopted in this country, (p. 114, n.,) and as it is not likely to afflict enlightened jurisprudence in the future, we may return to consider the right to begin in this action, which is about the only one where the mere forms of action have not been abolished, whose remedial functions are adapted to the ever-growing complexity of the law of remedies. Remedies, like the evolutions in nature, are tending to the complex from the general, Phil. Hist. Ev. — The action of "Case" is sufficiently general to include assumpsit, as shown in n. 1 to § 92. The right to begin is sufficiently illustrated as to the species of case called assumpsit. The *case* intended by the author is, no doubt, the species which are distinctly *tortuous*.

der, (*vide* Cooper vs. Wakley,(*b*) § 49, Wood vs. Pringle,(*c*) § 55, and Carter vs. Jones,(*d*) §§ 57, 62, the plaintiff always begins. The test seems to be that given by Tindal, C. J., in Reeve vs. Underhill,(*e*) § 63, viz., the action must be brought for heavy unliquidated damages sought in respect of some injury to the person or reputation, and of a malicious character. On this principle it is, in the absence of authority, presumed that actions on the case for malicious prosecution or malicious arrest, together

(*b*) 3 C. & P. 474. (*c*) 1 M. & R. 277. (*d*) 6 C. & P. 64. (*e*) 6 C. & P. 673.

If the facts which are the foundation of the remedy are not "tortuous," but are contractual, the action must be on the contract. Butler vs. Collins, 11 Cal. 391, and where the liability to do an act merely from an agreement to do it upon a good consideration, Courtenay vs. Earle, 10 C. B. 73; 16 Jur. 936, and there is no such relation between the contracting parties as would involve a common law duty in the performance, wholly independent of and *ultra* the contract, then the non-performance and breach is not tortuous, and the action must be on the contract, assumpsit, covenant, &c., id.

But in all cases in which the law imposes a duty in respect of the business of the contract in addition to the private agreement of the parties, the breach is remediable by action on the contract or in tort purely, at the election of the injured party, Legge vs. Tucker, 2 Jur. N. S. 1235; 1 H. & N. 500; Brown vs. Boorman, 11 C. & F. 1; 3 Q. B. 511. So either action may be supported for a false warranty on the sale of goods and chattels, Everton vs. Miles, 6 Johns. 138; Hallock vs. Powell, 2 Cai. 216; Williamson vs. Allison, 2 East. 446; Mahurin vs. Harding, 28 N. H. 128; Carter vs. Glass; (Mich. June 23, 1880,) 10 Rept'r 466; for breach of duty by an attorney, Simpson vs. Sprague, 6 Me. 470; Church vs. Mumford, 11 Johns. 479; for breach of duty by a common carrier, Lockwood vs. Bull, 1 Cow. 322; Bell vs. Ward, 1 Dana 147; Tattan vs. Great Western R. R. Co., 2 El. & El. 844; 6 Jur. N. S. 800; against a bailee for negligence, and if case be elected a count in trover may be joined, Ferrier vs. Wood, 9 Ark. 85; in general, any action for negligence as it implies a duty, Kahl vs. Love, 8 Yr. 5; and when the gist of the transaction is tort, if it arises out of a contract, Stoyel vs. Wescott, 2 Day (Conn.) 422; Bulkley vs. Storer, id. 531; Vasse vs. Smith, 6 Cranch. 226.

The election must be exhibited by the declaration, Booth vs. Farm. Nat. Bank of R., 65 Barb. 457; Welsh vs. Darrah, 52 N. Y. 590; wherein the court says, "That in assumpsit the pleader must always allege that the defendant *undertook and promised*," which invites a plea of *non-assumpsit*, Henion vs. Morton, 2 Ashm. (Pa.) 150; Bird vs. Mayer, 8 Wisc. 362. The assumpsit elements, *i. e.*,

with actions for criminal conversation and seduction, must be considered as coming within the rule. *Vide*, also, Bowles vs. Neale,(*f*) § 61.

§ 93. Actions of covenant seem to be governed in this respect by the same rules as those in assumpsit, and, as has been shown above, although the authorities are not uniform, yet the better opinion is that the new rule does not extend to them. *Vide* Reeve vs. Underhill,(*g*) § 63, Lewis vs. Wells,(*h*) § 64, Wooten vs. Barton,(*i*) § 65, Soward vs. Legatt,(*k*) § 9, and Absolon vs. Beaumont,(*l*) § 68.(1)

(*f*) 7 C. & P. 363. (*h*) 7 C. & P. 221. (*k*) 7 C. & P. 613.
(*g*) 6 C. & P. 775. (*i*) 1 M. & R. 518. (*l*) 1 M. & R. 441.

1. The legal effect of the seal renders covenant analogous to special assumpsit, and when defendent pleads affirmatively, he is entitled to begin. In covenant for non-repair the defendant pleaded affirmatively, which was denied by the replication. Coleridge, J., said: "The old rule was to look at the record and see on whom the affirmative lay; and I think the new rule of the *judges* has not varied it in actions of contract." Lewis vs. Wills, 7 C. & P. 221; Wooton vs. Barton, 1 M. & Rob. 518; Doe d. Trustees & C. R. Rowland, 9 C. & P. 734. Where the defendant is defaulted in an action of covenant, the plaintiff is not bound to prove the averments in his declaration, Courier vs. Graham, 1 Oh. 347; but to prove damages only, Simonton vs. Winter, 5 Pet. 148; and in his proof of damages, the evidence will be confined to the breaches set forth in the declaration. Mathews vs. Sims, 2 Mills (S. C.) Const. 103; Chapman vs. Emden, 9 C. & P. 715.

The plea of "covenant performed" with no *absque hoc*, to a declaration averring performance, admits plaintiff's performance. Zents vs. Leguard, 70 Pa. St. 192; Simonton vs. Winter, *supra*.

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the promise, was left out in Carter vs. Glass, *supra*, and on that account was held a tort and not contract. But why elect? The language of Selden, J., in Union Bank vs. Mott, 27 N. Y., "that its object is not to recover for money had and received by the defendants to the plaintiff's use (thus waiving the tort,) but to obtain judgment for the damages which the plaintiff has sustained through the fraudulent conduct of the defendants.

"This being the true foundation of the action, and all torts, committed by more than one person, furnishing several as well as joint causes of action, the right of action survived as well against the personal representatives of the deceased (because originating out of a contract), as against the surviving defendant. The surviving wrong-doer could not, however, in a common law action to recover damages, be joined with the representatives of his deceased associate, for the rea-

§ 94. The same may also be said of actions of debt, which seem to partake some of the nature of covenant and others of

son that there is no joint liability, and neither the same judgment could be rendered nor the same execution issued against both."

As to the distinction between trespass and case, the court say, in Plowman vs. Foster, 6 Coldw. 52: "There is an essential difference between actions of trespass and trespass on the case; the first is *stricti juris*, and matters in excuse or justification must be pleaded specially. The latter is founded in the equity and justice of the case, and whatever would, in equity and conscience, under existing circumstances, preclude the plaintiff from recovering, may be given in evidence under the general issue. The defendant is not bound to plead his defence specially, because the plaintiff must recover upon the justice and conscience of his case, and that only."

An action on the case will not, in general, lie for an injury which is the direct result of an act done with force. For such an injury trespass is usually the proper remedy, Sinnixon vs. Daugan, 8 N. J. L. 226; Winslow vs. Beal, 6 Call. 44; Clay vs. Sweet, 1 J. J. Marsh 194; Case vs. Mark, 2 Ham. (O.) 169; Ogle vs. Barnes, 8 T. R. 190.

Either case or trespass will lie where an injury to the plaintiff results from the immediate force of the defendant, and is caused by carelessness and negligence, and is not wilful, Brennan vs. Carpenter, 1 R. I. 474; Howard vs. Tyler, 46 Vt. 683; Frankenthal vs. Camp. 55 Ill. 169. The question, then, is, can the defendant obtain the right to open and close in actions on the case? Spencer, C. J., in Bank of Aub. vs. Weed, 19 Johns. 302, says: "Any grounds of defence which admits the facts in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove or disprove in the first instance on the general issue, may be pleaded specially," Maggert vs. Hansbergen, 8 Leigh. 537; Balt. & O. R. R. Co. vs. Polly, Woods & Co., 14 Gratt. 454. Each case must be examined by itself, and the rules of law applied to its solution. Whenever an affirmative plea can be pleaded, and is actually pleaded, the right to open and reply will be obtained.

In defamation, a plea that the words spoken or written was in a legislative or judicial proceeding is affirmative, Sydam, vs. Moffatt, 1 Sand. 464, *ante* 121–2, but otherwise where the words are but *prima facie* privileged, because "malice" is an element which cannot be justified by plea, *ante* 122, n., yet where a complete justification on the truth of the communication is pleaded, it is affirmative, *ante* p. 120. So a special plea of contributory negligence is a plea amounting to the general issue, as the burden of showing that the plaintiff was free from fault is on the plaintiff, Hale vs. Smith, 78 N. Y. 483; Reynolds vs. N. Y. C. R. R.

assumpsit.(1) In a case decided previous to June, 1833, Sandford vs. Hunt,(*m*) which was an action of debt on bond, to which *62 defendant *pleaded *solvit ad diem*, Park, J., held that the defendant should begin, as that plea alone had the effect of admitting the bond and the execution of it, and therefore cast the affirmative on the defendant. We have already seen that it has been decided, since the new rule, that in an action of debt for a penalty given by statute, the defendant is entitled to begin, if the affirmative lies on him, Silk vs. Humphrey,(*n*) § 61.

§ 95. In actions of trespass the same principles are to be fol-

(*m*) 1 C. & P. 118. (*n*) 7 C. & P. 613.

1. And it is held to be immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained, Stockwell vs. U. S., 13 Wall. 53; Chaffee vs. U. S., 18 Wall. 516; as upon records Res. vs. Lacose, 2 Dall. 123;—specialities Wet. R. R. Co. vs. Hill, 7 Ala. 772;—simple contracts, express or implied, verbal or written, Com. Dig. Debt, A. 9, 1 Chit. Pl. 121; Trapnall vs. Merrick, 21 Ark. 503;—and on statutes by a party aggrieved, or by a common informer, id.; Stockwell vs. U. S., 13 Wall. 531; Port Dry D. & Ins. Co. vs. Trustess of Port., 12 B. Mon. 77;—a *quantum meruit* for work, Norris vs. Winsor, 12 Me. 293; Thompson vs. Freuch, 10 Yerg 452; Van Dusen vs. Blum, 18 Pick. 299; generally on all contracts in deed or in law for the recovery of a sum certain, Underhill vs. Ellicombe, 1 M'Clel. & Y. 457; Meaknegs vs. Ochiltree, 5 Port. (Ala.) 395; Elder vs. Rouse, 15 Wend. 220. See 2 Waits Ac. & Def. 482.

Co., 58 id. 248; Button vs. Hud. R. R. 18 id. 248; Gaynor vs. Old Cal. R. R., 100 Mass. 208; Murphy vs. Deane, 101 id. 466; Hall vs. Mathews, 10 Irish L. 317; but all acts done by lawful authority may and ought to be specially pleaded, Martin vs. Clark, 1 Hemst. 259; McMillan vs. Staples, 37 Iowa 532; so of acts done by statutary authority, Vaughan vs. Taff. V. R. Co., 37 Me. 92; Burroughs vs. Hous. R. R. Co., 15 Conn. 131; Rood vs. N. Y. & E. R. R. Co., 18 Barb. 80; Sunbury & E. R. R. Co., vs. Hummell, 27 Pa. 99; Mor., &c., R. R. Co. vs. Newark, 10 N. J. Eq. 352: and where the plaintiff has consented to the act which occasions the loss, Broomis Leg. Max. 268; Ills. Cent. R. R. Co. vs. Allen, 39 Ill. 205; Walker vs. Fitts, 24 Pick. 191; Phillips vs. Wooster, 36 N. Y. 412.

But it must be remembered that a special plea which amounts to the general issue is a defect in form only, 1 Show. 76; subject to special demurrer only, Cro. Car. 157; 10 Co. 95; Com. Dig Pl. E. 14; Camp vs. Allen, &c., 7 Halst. (N. J.) 1; Kennedy vs. Strong, 10 Johns. 289. See *ante* p. 129.

lowed as we have mentioned above as applicable to case, viz., to see if the cause of action is for any personal wrong and of a malicious description, which calls for unliquidated damages.(1) In trespass *quare clausum fregit* it was held, previous to the new rule, that when this action was brought to try a right, the defendant was entitled to begin if the onus probandi lay upon him. *Vide* Hodges vs. Holder(*o*) and Jackson vs. Hesketh,(*p*) § 42. And in Pearson vs. Coles,(*q*) which was trespass for breaking the plaintiff's close, to which defendant pleaded *liberum tenementum*, and several others claiming a right of way over the *locus in quo*, it was held, per Patterson, J., that the defendant should begin; and there can be no doubt that such is still the practice. *Vide* Burrel vs. Nicholson,(*r*) § 60, which was decided since the new rule. But trespass for breaking a house and taking goods is a different kind of action. Here unliquidated damages are claimed, (*vide* the case of Cotton vs. James,(*s*) § 50,) still, it seems doubtful if the new rule applies, as it is not an injury to the person, (*quære tamen*, and *vide* Burrel vs. Nicholson,(*t*) *supra* § 60.

(*o*) 2 Camp. 366. (*q*) 1 M. & R. 205. (*s*) 3 C. & P. 504.
(*p*) 2 Stark. 519. (*r*) 6 C. & P. 202. (*t*) 6 C. & P. 202.

1. Strictly speaking, a right *stricti juris* is the gist of this action, Plowman vs. Foster, 6 Cald. (Tenn.) 52, cited in *ante* § 92, n., and when the trespass is proved, damages, though nominal, follow by operation of law *propio vigore*, Clark vs. Boardman, 42 Vt. 667; Howard vs. Black, id. 258; and unless nominal damages, at least, are given, a new trial will be granted, Norwell vs. Thompson, 2 Hill (S. C.) 470; and this is imperative, whether the plaintiff be benefitted or injured by the trespass, Murphy vs. Fondulac, 23 Wis. 365. The gist is the breaking and entering, and an allegation that "the defendant broke and entered the plaintiff's close," is a sufficient averment of possession, Finch vs. Alston, 2 Stew. & Port (Ala.) 83; Rucker vs. O'Neely, 4 Blackf. 179.

So upon common law principles the plea of "not guilty" operates as a denial that the defendant committed the trespass in the place mentioned, and admits plaintiff's posession, 1 Chit. Pl. 534; Apelby vs. Obert, 16 N. J. L. 336; Stone vs. Hubbard, 17 Pick. 217; Printz vs. Cheny, 11 Iowa 469; 2 C. & M. 23; and all matters in confession and avoidance or justification or discharge must be specially pleaded, Todd vs. Jackson, 2 Dutch 525; Beach vs. Livergood. 15 Ind. 496; Ward vs. Bartlett, 12 Allen 419; Gambling vs. Prince. 2 Nott. & M. (S. C.)

§ 96. It has already been shown that the not guilty to the force and arms is not a distinct issue, *supra* p. 128.

138; Hollenback vs. Rowley, 8 Allen 473; Sawyer vs. Newland, 9 Vt. 383; Carson vs. Wilson, 6 Halst. (N. J.) 43; Fidler vs. Smith, 10 Iowa 587; Austin vs. Norris, 11 Vt. 38; even though the evidence of such matter is furnished by the plaintiff in the proof of his case, Briggs vs. Mason, 31 Vt. 433; but evidence in mitigation merely is competent, Collins vs. Perkins, 31 Vt. 624.

So when plaintiff, in attempting to prove title, proves title in another, the defendant may take advantage of this under the general issue in mitigation of damages, Todd vs. Jackson, 2 Dutch. 526; so entering to destrain for rent may be justified under this plea because it is not a trespass—provided it be on the demised premises; otherwise not, Oliver vs. Phelps, Spen. (N. J.) 180; but that defendant went to the plaintiff's house to collect a debt must be specially pleaded, Vanbuskirk vs. Irving, 7 Cow. 35; Hatfield vs. Cent. R. R. Co., 5 Dutch. 571. Since a man does not trespass by entering upon his own land, if each party show an independent title of equal strength, the defendant fails, Heath vs. Williams, 25 Me. 209; Townsend vs. Kearnes, 2 Watts. (Pa.) 180; Caskey vs. Lewis, 5 B. Mon. 27; because a plea of title simply, admits plaintiff's possession, Apelby vs. Obert, 1 Harr. (N. J.) 336.

A count for asportation of goods may be joined with a count for trespass, q. c. f., Wilson vs. Johnson, 1 Greene, Iowa 147; Heiner vs. Wilcox, 1 Ind. 29; Moulton vs. Smith, 32 Me. 406; Carter vs. Wallace, 2 Tex. 206; and with a count for an assault and battery, Flinn vs. Andrews, 9 Ired. (N. C.) L. 328; Sampson vs. Henry, 13 Pick. 36; and a plea justifying the breaking and entering only is sufficient for the whole declaration, Herndon vs. Bartlett, 4 Port. (Ala.) 481.

All acts done by authority must be specially pleaded, Martin vs. Clark, 1 Hemst. 259; and in trespass against a sheriff it is not necessary to declare against him in his official capacity, as this authority can be available only by plea, Davis vs. Cooper, 6 Mo. 148. So in actions of trespass *de bonis asportatis*, "not guilty" admits title and possession of the plaintiff and negates only the commission of the acts of tresspass alleged, Carson vs. Prater, 6 Caldw. (Tenn.) 565.

But under the code a general denial admits nothing, and every allegation of the plaintiff may be disputed by any relevant evidence under this plea, Miller vs. Decker, 40 Barb. 234; Heim vs. Anderson, 2 Duer. 318; Stroud vs. Springfield, 28 Tex. 649.

So the right to open and close must follow the cases in the text, and the general rules or a new trial will be granted, Ayer vs. Austin, 9 Pick. 225; Seavy vs. Dearborn, 19 N. H. 351. See *ante* p. 115, n.

On the subject of trespass for assault and battery,(1) false imprisonment,(2) (and, it is presumed, criminal conversation *63 *and seduction,) the new rule clearly applies. *Vide* the old case of Bedell vs. Russell,(*u*) p. 103, and the late one of Atkinson vs. Warne, p. 120.

In an action of trespass for shooting a dog, it was held, in the case of Fish vs. Travers,(*x*) *supra* p. 111, that the defendant was entitled to begin if the onus probandi lay on him, and this being a mere injury to property, is not, it is conceived, affected by the new rule.

(*u*) R. & M. 293. (*x*) 3 C. & P. 578.

1. Pleas averring that plaintiff first assaulted defendant, &c., *son assault demesne*, are affirmative, and defendant has the right to open and close, McKenzie vs. Milligan, 1 Bay (S. C.) 248; Goldsberry vs. Statervill, 3 Bibb. (Ky.) 345; Downey vs. Day, 4 Ind. 531. The arbitrary rule of the English judges is of no force in this country, *ante* p. 103, n. So under the plea of *son assault*, with the general replication *de injuria*, &c., the burden of proof is on the defendant, who cannot give evidence in mitigation of damages, nor contradict the averments of aggravated injuries laid in the declaration, but is bound to show that the plaintiff committed the first assault, and that what was done on his own part was in the necessary defense of his person, 2 Wat. on Tress., § 244; Frederick vs. Gilbert, 8 Pa. 454. "Not guilty," with *son assault*, &c., should be pleaded to put plaintiff upon proof of every material allegation in his declaration, Cogell vs. Gett, 1 Coldw. (Tenn.) 230.

2. Imprisonments are *prima facie* trespasses, and the plaintiff need not allege them to be unlawful, Gallinore vs. Ammerman, 39 Ind. 323, nor that there was malice or want of probable cause, Coulter vs. Lower, 35 Ind. 285; Miller vs. Adams, 7 Lans. 13, as the arrest itself makes a case under the law, Dietrich vs. Shaw, 43 Ind. 175; no justification is provable under the general issue; actual authority must be pleaded and proved. Boaz vs. Tate, 43 Ind. 60; Brown vs. Chadsey, 39 Barb. 253; design or intention to do official duty not enough—must have actual authority, Lunblone vs. Ramsey, 75 Ill. 246; Prell vs. McDonald, 7 Kans. 426; nor will advice of counsel amount to justification, Josselyn vs. McAlister, 22 Mich. 300; and to constitute liability manual arrest is not necessary. A demonstration looking to an arrest, which, to all appearances, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission, Brushaben vs. Hageman, 22 Mich. 266. There is no better settled principle in the law than the one requiring the defendant to begin when he justifies by affirmative pleas only. *Ante* p. 48 n. 1.

§ 97. On the subject of actions of trover,(1) *vide* the cases of Tuberville vs. Patrick,(*y*) p. 95, and Scott vs. Lewis,(*z*) p. 22; and remark that trover is always an injury to *property* and not to the person.

§ 98. To pass on to certain miscellaneous proceedings. In an information in the nature of a *quo warranto*, calling on the defendant to show by what authority he exercised a certain office, to which the defendant pleaded several pleas, to each of which the relator replied specially, Park, J., said: "I believe the point is new; as the affirmative of the issue is on the defendant, he must begin, but if on the pleadings the affirmative had been on the relator, he must have begun."(*a*)

§ 99. And in a writ of error to reverse the outlawry of the plaintiff, the error assigned was, that the plaintiff in error, before and at the time of awarding the *exegi facias*, was beyond sea; to this it was pleaded that the plaintiff in error, before awarding the *exegi facias*, &c., of his own fraud and covin, and in order to defeat the defendant in error of the means, &c., and for the purpose of avoiding said outlawry when the same should be pronounced, went voluntarily beyond seas, &c., which was traversed by the plaintiff in error and issue joined; and per Abbott, C. J.: "I think the defendant in error should begin, because the affirm-

(*y*) 4 C. & P. 557.
(*z*) 7 C. & P. 347
(*a*) Rex vs. Yates, 1 C. & P. 323, *ante* p. 54, n.; State vs. Hunton, 28 Vt 594.

1. It is held, no doubt correctly, that all matters of defence in this action may be given in evidence under the "general issue," except release and limitation, and that a plea of justification on the part of an officer selling property under an execution is unnecessary, Pemberton vs. Smith, 3 Head. (Tenn.) 48; but if the officer attempt to justify he must set out complete state of justifying facts, Young vs. Davis, 30 Ala. 213; Hopkins vs. Shelton, 37 id. 306; Vaden vs. Ellis, 18 Ark. 355; and no special plea is good unless it confesses the conversion and the plaintiff's title, Coffin vs. Anderson, 4 Blackf. 395; and the character in which the plaintiff sues, Bank of Auburn vs. Weed, 19 Johns. 302. The general issue is recommended as the better practice, and special pleas in trover are discouraged, Kennedy vs. Strong, 10 Johns. 291. Indeed, it is held in some of the old cases that any attempt at giving the plaintiff color—*i. e.*, admitting his case—must be bad, as amounting to the general issue, Latch 185; Cro. Eliz. 555, 146; 1 Leon 178.

ative of the question of fraud lies upon him, for the fact of the *64 plaintiff in *error having been actually abroad is admitted on the record."(*b*)(1)

(*b*) Bryan vs. Wagstaffe, 2 C. & P. 125.

1. Where it is necessary to have authority from the court to sue, the burden is on the plaintiff to show such authority, and there is no right of action without such authority, Schofield vs. Doscher, 72 N. Y. 491. In all special cases, cases reserved, special cases stated, the plaintiff holds the affirmative, and must open and reply, Dem. Green vs. Stillwell, 5 Halst. (N. J.) 60; Dem. Hopper vs. Demorest, 1 Zab. (N. J.) 525; so in arguments of rules to show cause, the counsel who obtained the rule begins and concludes, Mitchell's Motions and Rules, &c., 29 Pa. But if the rule be *nisi* with a *prima facie* case made against the party showing cause, he is entitled to close, Boyce vs. Burchard, 21 Ga. 74; 1 Cow. 15.

On appeal from an award of damages made by commissioners for lands condemned by a corporation, the appeal being taken by the land-owner, he is entitled to the opening and reply, M. & E. R. R. Co. vs. Bonnell, 5 Vr. 474; Mumisomet vs. Grenby, 111 Mass. 545. On a motion by the plaintiff to enter a rule confirming such award and a counter motion by the land-owner to set it aside, the plaintiff is entitled to open and reply, Gerach vs. Bayonne, Feb. 1877, decided in N. J. orally.

An executor or other creditor seeking to establish his claim against the estate, has the affirmative of the issue, and is entitled to open and close the case, Yingling vs. Hesson, 16 Md. 112; so in a suit in garnishment interpleading claimants having the affirmative may, without error, be ordered to open and close to the jury, Randolf Bank vs. Armstrong, 11 Iowa 515.

In a suit of interpleader brought by an acceptor to determine whether one who held and had brought suit on his acceptance, or one who claimed to be entitled to it by virtue of a transfer from the payor alleged to have been made before the transfer to the holder, was entitled to payment; *held*, that it was not error to allow the holder to open and close, as holding the affirmative of the issue, Wills vs. Stamps, 36 Tex. 48.

In a suit instituted by A. to contest the validity of a will, the court ordered a formal issue to be made up without objection by A., in which the defendant B. should declare that the writing was the will of the testator and the plaintiff A. should plead that it was not; and on the trial of this issue, the court ordered the defendant B. to open and close, Raudebaugh vs. Shelly, 6 Oh. St. 307; Green vs. Green, 3 O. 278. So a party who pleads undue influence only, in opposition to the validity of a will, is entitled to begin. So also the party propounding the last will, Hutley vs. Grimstone, 41 L. T. R. N. S. 531; 9 Reporter 224. See *infra* § 106.

§ 100. We have hitherto purposely deferred considering the important actions of ejectment and replevin. With respect to the former, it is now, since the disuse of real and mixed actions, and the recent abolition of all except *four*, become almost the only means of trying the title to real property, and therefore deserves our most attentive consideration. The cases on this subject well illustrate the position that the defendant, by admitting the case of his adversary, can get for himself the right to begin. The first case to which we shall refer is that of Doe d. Chamberlayne vs. Lloyd.(*c*) Here a landlord had obtained a verdict in ejectment against his tenant, who now brought a cross one; the defendant admitted the lease, and was allowed to begin, which he did by proving acts of forfeiture.

§ 101. That was the case of an ejectment between landlord and tenant. The next class of cases we shall consider is, where this action is brought by the heir-at-law in order to recover land which belonged to his ancestor. In ejectment it is a general principle that a party must recover on the strength of his own title,

(*c*) Peak's Ev. 5.

In every case made for argument, the party who is to open the argument must deliver to the court and opposite counsel the point he means to insist on, Mann vs. Newtown, 3 Johns. 542; Schmedt vs. United Ins. Co., 1 id. 63.

On *habeas corpus* the burden is on the relator to show that he is illegally deprived of his liberty, *ex parte* Bridewell, Miss. Oct., 1878; 8 Reporter 689. As to *quo warranto*, *vide* p. 54, *ante*.

The demurrant has the opening and closing, Bishop vs. Day, 13 Vt. 116. So if a party demur and pleads the statute of limitations, he should go forward, Payne vs. Hathaway, 3 id. 212. As to *mandamus*, the party showing cause against return begins, Rex vs. St. Pancras, 3 A. & E. 535.

And in appeals the burden of showing error in the decision in review is upon the appellant. He must show affirmatively that the law applicable to his case is in his favor and requires a reversal. He cannot be aided by intendements or inferences, Herriter vs. Porter, 23 Cal. 385; Tood vs. Winats, 36 id. 129; Reese vs. Beck, 9 Ind. 238; Hughes vs. State, 4 Iowa 554; St. Louis, &c., Ins. Co. vs. Cohen, 29 Mo. 421; Grant vs. Morse, 22 N. Y. 323; Mead vs. Bunn, 32 id. 275; and the rule applies to Chancery proceedings as well as law, Garner vs. Pomroy, 11 Iowa 149. If it appear by the judgment record that there was no trial by the jury below, and that no evidence was given to the court, it will be presumed, on appeal, that the cause was heard on the pleadings alone. Belt vs. Davis, 1 Cal. 134

and not on the weakness of his adversary's, and consequently when an ejectment is brought by a person as heir at-law, he must establish, first, his relationship to the party through whom he claims; and, secondly, that that party was the person last actually seized of the freehold and inheritance.(*d*) Now, in the case of Fenn d. Wright vs. Johnson,(*e*) the defendant expressed himself willing to admit the lessor of the plaintiff to be the heir-at-law, but set up a new case for himself, and was then allowed by Le Blanc, J., to begin. The same case has been previously tried *65 *before Gibbs, J., who ruled directly *contra;* but it was tried a third time (summer assizes, 1813) before Wood, B., who took the same view of the case as Le Blanc, and allowed defendant to begin.

§ 102. The admission, however, of the heirship of the lessor of the plaintiff must be a direct and not a qualified one. Thus in Doe d. Warren vs. Bray,(*f*) the lessor of the plaintiff claimed as heir-at law of H. B., the person last seized. A. B., one of the defendants, was son of T. B., brother of H. B., and he was undoubtedly the heir at-law to H. B. if he were legitimate. Defendant offered to admit that if the defendant A. B. were not legitimate, the lessor of the plaintiff was heir-at law of the person last seized, and they then claimed the right to begin, on the ground that after that admission, the legitimacy of A. B. was the only question, and the affirmative lay on them. But Vaughan, B., said "that the plaintiff must begin. Generally the party on whom the affirmative lies has that right: the fallacy is in the application of that rule to this particular case. The question is, whether the lessor of the plaintiff is heir-in-law to H. B.; the affirmative of the issue is on the plaintiff; it may turn out that the question turns entirely on the legitimacy of A. B., but still the issue is not on that fact, but on the heirship of the lessor of the plaintiff. In the case cited the admission was of the heirship or of the validity of a prior will; and then the cause turned entirely on a subsequent question, the validity of a will or codicil, of which the defendant was to prove the affirmative; here

(*d*) 2 Phil. Ev. 232. (*e*) Ad. on Ej. 256. (*f*) M. & M. 166.

the admission does not go so far, and I think it does not give the defendant a right to begin."

§ 103. In a subsequent case, however, it was decided (and probably that was the view taken by Gibbs, J., in Fenn d. Wright
*66 vs. Johnson,)(*g*) that the admitting the heirship at law *of the lessor of the plaintiff is not a sufficient admission to entitle the defendant to begin, unless the fact that his ancestor died seized to be admitted also. In Doe d. Tucker vs. Tucker,(*h*) where the lessor of the plaintiff claimed as heir-at-law of J. T., defendant claimed under a conveyance made by J. T., and, offering to admit the lessor's heirship, claimed the right to begin. Against this the plaintiff contended that sufficient had not been admitted; that a material part of the plaintiff's case—viz., his ancestor's dying seized—was still necessary to be proved by him: sed per Ballond, B.: "Unless the defendant admits the whole case of the plaintiff, the plaintiff must begin," which he accordingly did.

§ 104. The next case is that of Doe d. Woollaston vs. Barnes.(*i*) One J. C. had died in 1833 seized of some property. After his death S. R., his sister and heiress-at-law, took possession of it, and, having made a will devising her real property, had died also. This was an action of ejectment, containing demises from the heir-at-law of J. C. and S. R., and also from the devisees of S. R. to recover this property from the defendant, who claimed under a will made by J. C. The defendant proposed to admit that J. C. died seized; that S. R. was his heiress, and had possession of the property from the time of his death; that the plaintiff was heir-at-law of J. C. and S. R., and that the plaintiff was entitled to the property unless he proved the will of J. C.; and on these admissions claimed the right to begin; and argued that the proper mode of trying that right was by considering the case as it would be, supposing the parties had deduced their titles in the pleadings; in that case the averment by the defendant, in answer to the plaintiff's title, would have been that J. C. had made the will in question, and the plaintiff must have traversed
*67 that, on which *the affirmative of the issue would have

(*g*) Ad. on Ej. 256. (*h*) M. & M. 536. (*i*) 1 M. & R. 386.

been on the defendant, as it here was; in fact, the only question being if J. C. had made a will or not. The plaintiff, on the contrary, argued, that the defendant was bound to admit the whole of the plaintiff's case, and cited Doe d. Tucker vs. Tucker;(*k*) that here it was part of the plaintiff's case that S. R. died seized, which would not be if J. C. had made the will in question; that the defendant might meet the plaintiff's case by some subsequent fact defeating the case, but he must admit all that the plaintiff was bound to prove in order to make out his case. Upon which Lord Denman said: "I think that on principle the defendant admits enough to entitle him to begin. Here the defendant admits all that the plaintiff requires to entitle him to a verdict, except the single fact of the descent to S. R.; that he proposes to defeat by a will which he will have to prove, and on that will is the single issue in the case. If, instead of the general form and statement in ejectment, the titles had been deduced in the pleadings, the issue must have been upon the will, and I think that is a correct mode of trying the question."

§ 105. The case of Doe d. Smith,(*l*) confirms the doctrine laid down in the last case, and goes a step farther, namely, that the plaintiff cannot, by taking the assignment of an outstanding term, defeat the right which the defendant has to admit the *prima facie* case of his adversary and begin. There the plaintiff claimed as heir-at-law of Mrs. Smith; defendant said that he admitted that fact, and also that she died seized but claimed himself under a will made by her. The plaintiff said that as to part of the property in question, he claimed as assignee of an outstanding term, the assignment of which he was ready to prove, as forming the title to that part of the property independent of the will. *68 Doe d. *Tucker vs. Tucker,(*m*) and Doe d. Wollaston vs. Barnes,(*n*) were cited; and the defendant refused to admit the assignment. Gurney, B., then consulted Patterson, J., and said: "Both of us are of opinion that the defendant is entitled to begin. The real question in dispute is the validity of this will. The mischief would be extremely great, if a party, by merely

(*k*) M. & M. 536, § 103, *supra* (*l*) 1 M. & R. 476. (*m*) M. & M. 536 (*n*) M. & R. 386.

getting an outstanding term, should obtain an advantage to which he is not really entitled."(1)

§ 106. The case of Doe d. Corbett vs. Corbett,(*o*) is one of a different nature from those we have been considering, although

(*o*) 3 Camp. 368.

1. The burden is on the plaintiff in the following cases: To induce his title from a common source, Miller vs. Hardin, 64 Mo. 545; and neither can dispute the title of such person, Ames vs. Beckley, 48 Vt. 395; but a presumptive title, or title subject to some formal defects, may be sufficient, Johnson vs. Jackson, 70 Pa. St. 164; Campbell vs. Fletcher, 37 Md. 430; though it must be legal contra-distinguished to equitable, Mulford vs. Tunis, 35 N. J. L. 256.

Proof of legal title in the plaintiff will sustain his action of ejectment, and throw on the defendant relying on the statute of limitations the burden of proving adverse possession, Halsey vs. Wood, 55 Mo. 252; and the converse obtains where plaintiff claims by adverse possession and the defendant title by deed. Barr vs. Galloway, 1 McLean 476; so where the plaintiff seeks to recover on the ground that the defendant has not performed his covenants in neglecting to pay the notes given for the purchase of the land in controversy—to show such default, Roland vs. Fischer, 30 Ill. 224; and in all cases the party alleging a breach of covenant of title must prove not only the making of the covenants, but also the breach thereof, and has the burden of proof on both branches, Peck vs. Houghtaling, 35 Mich. 127.

He has the burden to show paramount title, and until that is done the defendant is not required to exhibit title to defeat a recovery, Holbrook vs. Nichols, 36 Ill. 161; and if a judgment debtor, under a sheriff's sale, refuses to give up the possession of the land, plaintiff has the burden of showing the judgment, the *fi. fa.* and the sale of the land, which may be done either by a deed from the sheriff or a return of the *fi. fa.*, Tenwiek vs. Floyd, 1 H. & J. (Md.) 172; Johnson vs. Hasbrouck, 12 Johns. 213; Den vs. Morse, 12 N. J. L. 331; and, generally, when the plea is "not guilty," to establish a good title, but he is not obliged to pursue any particular order of proof in tracing his title, Laughe's lessee vs. Jones, 26 Md. 472; but is bound to prove the land sued for is within the boundaries of a confirmation, Papin vs. Allen, 33 Mo. 260.

Ejectment will not lie against the widow at the suit of the heir. He must proceed under the partition acts to have her share ascertained and secured to her, Gronley vs. Kinley, 66 Pa. 270; Brown vs. Colson, 41 Ga. 42.

The burden has been held to be on the defendant in the following cases: Where the plaintiff claims title under a deed from A., and the defendant produced subsequent deeds of the same lands from a person of the same name, under which he claims, to show that the grantor in the first deed was not the owner of the

it was governed by and strongly supports the same general principle as they, namely, that the defendant, by admitting the *prima facie* case of the plaintiff, can always get to himself the right to begin. In that case the lessor of the plaintiff (instead of as heir-at-law) claimed under a will made by Sir R. C. in 1764, and the defendant, under a codicil to the same will made in 1771, which was impeached by the plaintiff, on the ground that the testator at the time of its execution was in his dotage and under undue influence. The defendant admitted the title of the plaintiff under the will, and claimed the right to begin; and per Bayley, J.: "I think the devisee named in the codicil stands in the same relation to the devisee named in the will, as the devisee in the will does to the heir-at-law. Between the two latter, the question turns on the validity of the will;" and defendant began.(1)

§ 107. We next proceed to consider the action of replevin.(2) In Bulforde vs. Cooke,(*p*) which was an action of this descrip-

(*p*) Peak's Ev. 5.

1. The one who first denies the validity of a testamentary paper as a testamentary paper, and asks for issues to determine the question, is entitled to open and close the case before a jury, Edilin vs. Edilin, 6 Md. 288; Townshend vs. Townshend, 7 Gill. 10; Farrell vs. Brennan, 32 Mo. 328; McClintock, 32 id. 411; Van Cleave vs. Beam, 2 Dana 155. See *ante* § 98, n.

2. See *ante* p. 27 and § 72. Upon a plea of property in the defendant the burden of proof is thrown upon the plaintiff, Williamson vs. Ringold, 4 Cr. C. C. 39; Pennington vs. Chandler, 5 Har. (Del.) 394; Anderson vs. Talcott, 6 Ill. 365; Turner vs. Cool, 23 Ind. 56; Henderson vs. Casteel, 3 Cr. C. C. 365; so under this issue defendant may show any legal title to the property, no matter how derived, O'Conner vs. Union Line, &c., Co., 31 Ill. 230, and as the plaintiff cannot recover unless he shows title in himself, the defendant may defeat the

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premises granted, Jackson vs. Cody, 9 Cow. 140; Doe vs. Roe, Ga. Dec., part 1, 140; so where he relies on a deed claimed to have been given to him by the plaintiff, but lost, he must not only prove the existence of the deed, but its contents, Sais vs. Sais, 49 Cal. 264; see Ernig vs. Deihl, 76 Pa. 350; and where the defendants claim the land under proceedings in partition, under a bill in chancery, to produce the entire record of the chancery proceedings, or, at least, all those parts which related to or might affect the interest of the plaintiffs, Platt vs. Stewart, 10 Mich. 260.

tion, the defendant, without the general issue, pleaded *liberum tenementum*: and per Le Blanc, J.: "He was entitled to begin." In Colstone vs. Hiscolbs,(*q*) which was an action of replevin brought for a horse, the defendant pleaded that the horse was the *69 property of one S. H., and *not of the plaintiff, as the declaration supposed; to which the plaintiff replied that the horse was not the property of S. H., but of the plaintiff, on which issue

(*q*) 1 M. & R. 301.

action by showing title in a third person, without connecting himself with that person, Robinson vs. Calloway, 4 Ark. 94; Tomlinson vs. Collins, 20 Conn. 364; Simcoke vs. Frederick, 1 Ind. 54; Howland vs. Fuller, 8 Minn. 50; Redman vs. Hendrickson, 1 Sandf. 32; Lester vs. McDowell, 18 Pa. 91; so the defendant may show that he and the plaintiff were joint owners, in order to rebut the exclusive right and possession of the plaintiff, Chambers vs. Hunt, 3 Harr. (N. J.) 339, affirmed 1 Zab. 620. Hornblower, J., says, 3 Harr. (N. J.) 343: "Hence it is that several persons, having *separate and distinct interests* in the property, cannot join in replevin, though joint tenants, tenants in common and coparceners may." And for the same reason it is a good plea in abatement or in bar to say the property is in the plaintiff and defendant or in the plaintiff and a stranger; or, if there be two or more plaintiffs, that it is in one of them; but each of these pleas must specially traverse by *et non* or *absque hoc*, that the property is in the plaintiff, in manner and form, &c., Co. Litt. 145-6; Cro. Eliz. 350; Bull. N. P. 53, and cases above cited. In Harrison vs. McIntosh, 1 Johns. 380, Kent, C. J., says: "A plea of property in a stranger is a good plea in abatement or bar, and entitles the defendant to a return without avowry," 2 Lev. 92; 1 Salk. 94. In Hart vs. Fitzgerald, 2 Mass. 509, Parsons, C. J., says replevin is founded in a general or special property in the plaintiff, and all the part owners must join in the action, The Preside, &c., vs. Storrs, 6 Mass. 425; Gardiner vs. Dutch, 9 id. 427; and by Justice Storey, in 4 Mason's U. S. C. C. 515, 538: "The plea of *non cepit* and *non detinet* concedes the right of property to be in the plaintiff, and only puts in issue the caption and detention, Vanneman vs. Bradley, 69 Ill. 299; but *non detinet* admits wrongful taking, alleged, Simmons vs. Jenkins, 79 Ill. 479."

So the want of an affirmative allegation of ownership by the plaintiff is fatal in arrest, Schofield vs. Whitlegge, 33 N. Y. Superior Ct. 81; he must take the burden and recover on the strength of his own title solely. Reynolds vs. McCormick, 62 Ill. 412; and the action will be barred by any proof that the plaintiff, when he began his suit, had no right to the possession. Clark vs. West, 23 Mich. 242.

was joined. The plaintiff claimed the right to begin, and argued that the plea was only a denial of the allegation that the horse was the property of the plaintiff; the defendant, on the other hand, said, that in order to defeat the action he was bound to do more, viz., to prove that the horse was the property of S. H. Alderson, B., (after consulting with Patterson, J., who agreed with him,) called on the defendant to begin.(2)

§ 108. It has been already mentioned, that in general, where there are several issues joined between the parties, the proof of any one of them lying on the plaintiff gives him a right to begin, and that attempts had been made, though without success, to dis-

2. This was error; the burden was on the plaintiff, Robinson vs. Colloway, 4 Ark. 94; Tomlinson vs. Collins, 20 Conn. 364; Simcoke vs. Frederick, 1 Ind. 54; Howland vs. Fuller, 8 Minn. 59; Redman vs. Hendrickson, 1 Sandf. 32; Lester vs. McDowell, 18 Pa. 91; Hunt vs. Chambers, 3 Harr. (N. J.) —; Harwood vs. Smithurst, 29 N. J. L. 195; Kennedy vs. Clayton, 29 Ark. 270. But where the defendant pleaded in avoidance a lien on the goods—*held*, that the right of the plaintiff was thereby admitted, unless the defendant made out his plea, and that, therefore, the burden was on him, and he should open and close. The proof of value by the plaintiff is incidental, and does not affect this, McLees vs. Felt, 11 Ind. 218.

A partner having the right of possession of the whole partnership property, as such, may maintain this action, Bostic vs. Brittain, 15 Ark. 482; Smith vs. Wood, 31 Md. 293. Where the plaintiff's logs had been mixed with those of defendant, he is entitled to recover a quantity of logs out of the common mass equal to his own, Eldrid vs. Oconto Co., 33 Wis. 133; Stearns vs. Raymond, 26 Wis. 74.

Damages in a replevin suit can only be recovered where the detention is wrongful; but the detention of property acquired at a judicial sale is not wrongful, even against the true owner, unless after proper notice and demand, Arthur vs. Wallace, 8 Kans. 267.

The question of value is not in issue, Thomas vs. Spafford, 46 Me. 408, and damages on replevin bond must be assessed upon a writ of inquiry, Peacock vs. Haney, 37 N. J. L. 179; McLees vs. Felt, 11 Ind. 218.

In replevin the defendant avowed the taking in a certain lot, and alleged that it was his soil and freehold. The plaintiff replied that the soil and freehold was in A., and tendered an issue thereon, which the defendant joined. *Held*, that the plaintiff had the right to open and close, Thurston vs. Kennet, 22 N. H. 151.

tinguish the action of replevin in this respect from the other forms. In Curtis et al. vs. Wheeler et al.,(*r*) the plaintiffs having declared as assignees of one Collison a bankrupt, the defendant Wheeler avowed, and the others made cognizance for rent in arrear, on a demise made by Wheeler to the bankrupt, and there were several avowries and cognizances stating the tenancy in different ways; to each of these the plaintiff pleaded in bar. 1. *Non tenuit.* 2. Riens in arrear. 3. A special plea, that the bankrupt had let certain other rooms to the defendant at £42 a year, and that it had been agreed between them that the £42 rent should be set off against the other, and averred that a greater sum was due to the bankrupts at the time of the distress than was due by the bankrupt to Wheeler. The replication to this plea in bar traversed the agreement to set off one rent against the other, and also denied that more rent was due from Wheeler than from the bankrupt. The plaintiff claimed the right to begin, as the allegation that one rent was to have been set off against *70 the other was *an affirmative issue which lay on him. The defendant said that in replevin the plaintiff had no such privilege, as both parties were equally actors, and that all matters stated in the third plea could be given in evidence under the second issue of reins in arrear. But Lord Tenterden said "that he was not sure that the matter of that plea could be given in evidence under reins in arrear; that he was afraid to make distinction in actions, and if there was any affirmative on the plaintiff he was entitled to begin, and that here there was one on him."(1)

§ 109. Again in the case of Williams, administrator of Williams vs. Thomas,(*s*) the defendant made six cognizances for rent in arrear. The first stated that the rent was £200 a year and three tons of coals per month; the second, that the rent was £200 a year and 10d. per ton on all coal raised from the premises, but that the rent of £200 a year should be deducted from the 10d. per ton and three tons of coals monthly; the other three

(*r*) 4 C. & P. 198; M. & M. 493. (*s*) 4 C. & P. 234.

1. Hungerford vs. Barr, 4 Cr. C. C. 349; Greer vs. Nourse, id. 527.

cognizances varied slightly from the second. To the first cognizance the plaintiff pleaded—1. That the £200 was not in arrear, and that the coal was never demanded. 2. That neither the £200 nor the coals were in arrear, and to each of the five others he pleaded separately. 1. *Non tenuit.* 2. Riens in arrear. 3. That the 10d. per ton never exceeded £200 a year. He then pleaded, as an eighteenth plea, which went to the last five cognizances, that all the demises in those cognizances were one and the same; that an agreement had been entered into between the intestate and J. M., the person to whom defendant was bailiff, and that the intestate was induced by J. M. to enter into another agreement (which was set out); and that each of the demises mentioned in the last five cognizances was the demise in the second agreement, which, before any rent became due, was abandoned by mutual consent. The nineteenth plea was similar to *71 the *eighteenth, except that it averred that the second agreement had been obtained by fraud and misrepresentation, instead of saying that it was abandoned. The replication to the eighteenth plea traversed the abandonment, and that to the nineteenth, the fraud, &c. On these pleadings the defendant claimed the right to begin, and contended that although the affirmative of the issue taken on the eighteenth and nineteenth pleas was, in point of form, on the plaintiff, yet, as those pleas amounted in substance to no more than *non tenuit*, it lay on the defendant to prove the tenancy. Sed per Bollaurd, B.: "These pleas do amount very nearly to *non tenuit;* yet, as in point of form the affirmative is on the plaintiff, I think he ought to begin." And, lastly, in the case of James vs. Salter,(*t*) the defendant avowed, as a distress for an annuity due under the will of J. S., to which the plaintiff pleaded in bar, that the annuity devised by will was first charged on certain leasehold lands of which the testator died possessed, and in deficiency of same, then on the premises in question; the replication to which traversed the allegation that the testator died possessed of leasehold lands. There were, it seems, also other pleas in which the issue lay on the defendant;

(*t*) 1 M. & R. 501.

plaintiff claimed the right to begin, as the issue on the first plea was on him. To this the defendant's counsel argued that the defendant in replevin had the right to begin, as he was in substance the plaintiff, and the issue lying on him gave him the right. Sed per Gurney, B.: "The same rule prevails in replevin as in other actions; any one issue lying on the plaintiff gives him a right to begin." Manning, amicus Cur. cited a case not reported, Rose vs. Brown, in which Gibbs, C. J., held that in replevin, as in other actions, one issue lying on the plaintiff gave him a right to begin.

§ 110. The case of Williams vs. Thomas (*u*) affords an excellent *72 *illustration of the general principle, that one issue lying on the plaintiff gives him a right to begin; here there were *nineteen* issues joined, the onus of proving *seventeen* of which lay on the defendant, yet, as the onus of proving the two others lay on the plaintiff, it was held that he had a general right to begin.

§ 111. It is sometimes said that the decision of the question as to who has a right to begin is a matter solely for the consideration and discretion of the judge at *nisi prius*,[1]) and that the court in banc will never set aside a verdict, or take any step to rectify any error into which he may have fallen in this respect, unless, perhaps, such error was induced by malpractice or surprise. There are some expressions in our reports which seem strongly to countenance this doctrine. In the case of Hare vs. Munn,(*x*) Lord Tenderden actually reversed the order of proceedings, as he said he considered, on hearing the statement of the evidence about to be offered, that it would be more convenient to take the plaintiff's evidence first; and in another case, Fowler vs. Coster,(*y*) the very next day, decided otherwise, saying that in Hare vs. Munn he had not intended to lay down any general rule. Also in the case Burrel vs. Nicholson,(*z*) where the court

(*u*) 4 C. & P. 234. (*x*) M. & M. 241. (*y*) Ib., 3 C. & P. 436. (*z*) 6 C. & P. 202; 1 M. & R. 304.

1. The right to open and reply is not *strictí juris* a primary proposition, but a consequential one, depending upon the burden of proof upon the propositions strictly put in issue, Smith vs. Sergeant, *ante* p. 90; Penhryn Slate Co. vs. Meyer, De Groff vs. Carmichael, *ante* p. 88, and when the ruling upon the pleadings is

was moved for a new trial, on the ground that according to the form of the pleadings and practice of the court, the plaintiff instead of defendant should have been called on to begin ; the court took time to consider whether they would grant a rule to show cause, and, on a subsequent day, Lord Chief Justice Denman said "That the court doubted whether, under any circumstances, a new trial ought to be granted, on the ground that the judge at *nisi prius* had come to an incorrect decision on a point of this kind. It seemed rather a matter of practice and regula-
*73 tion for the presiding judge to exercise *his discretion upon,

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erroneous in casting the burden on the wrong party, even when no evidence be offered, it will be reversed, Dwelle vs. Roath, 29 Ga. 733; N. Y. Dry Dock Co. vs. M'Intosh, 5 Hill 290; and the court is bound to instruct as to the presumption in the absence of proof, Potter vs. Chadsey, 16 Abb. Pr. 146; any ruling at the trial which improperly transfers the burden of proof from one party to the other is reversable error, Millard vs. Thorn, 56 N. Y. 405; Johnson vs. Collins, 17 Ala. 318; Nickerson et als. vs. Rugar et als., 76 N. Y. 280; *ante* p. 16; Chambers vs. Hunt, 3 Harr. (N. J.) 329; affirmed in 1 Zab. 620.

To the credit of our jurisprudence few cases have occurred presenting the absurdity, that the court first decided the burden or affirmative of the issue was on the defendant; and, secondly, ordered the plaintiff to open and close; and, thirdly, upon review adjudged it no error, Church, C. J., in Heineman vs. Heard, 62 N. Y. 456, says: "The question of which party has the affirmative of an issue is in many cases very material, as the case might be one in which the jury might hesitate in finding that the plaintiff had established the charge, and yet when they would not find that it had been satisfactorily answered." E. Darwin Smith, J., in Huntington vs. Conkey, 33 Barb. 220, says: "The right to begin and the right to reply, in trials at the Circuit, is *unquestionably of much practical consequence*. The privilege of making the opening statement to the jury, and of making the closing argument upon the evidence, is an advantage not unappreciated or inconsiderately sought and claimed by the counsel for litigating parties in courts of justice. In many cases it is of the highest importance, and particularly so where the facts are complicated and there is contrariety in the evidence, or it is nicely balanced and slight circumstances are likely to turn the scale. In cases where there is a great preponderance in the testimony on one side it may be quite immaterial, but there is obviously a *right rule* on the subject that should be asserted and maintained. * * * But it seems to me that it is a mistake to regard the question as purely one of practice. It is a question of *right* and of

than one which the court in banc were to determine as a matter of law. But that, at all events, the court was of opinion that in the principal case the judge had rightly admitted the defendant to begin;" and refused the rule on that ground. And in the case of Doe d. Pile vs. Wilson,(*a*) when Goodtitle d. Revett vs. Braham was cited as being a case in banc on that point, Denman, C. J., said: "I do not much rely on any decision in banc on such point [N. B.—It was not a case in banc after all, but a trial at bar], because I believe it is always said in banc that these points of practice are for the decision of the judge at *nisi prius;* and I think that the judges in banc would be very slow to interfere with the ruling on such a point unless it was a surprise." And in Scott vs. Lewis,(*b*) where a question was raised relative to the right to begin, (*vide* this case *supra* chap. 1, p. 22,) Coleridge, J., said: "Questions of this sort must be decided more upon what justice to the parties requires, than upon any strict rule of practice."(1)

(*a*) 1 M. & R. 323. (*b*) 7 C. & P. 347.

1. In Pennsylvania, in Richards vs. Nixon, 20 Pa. 23, the question was raised, but the court held that the decision on the trial was correct; but Judge Black

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law. Wherever the rule is stated, in almost all the reported cases, it is stated as a matter of *right*." A new trial was granted on the authority of Davis vs. Mason, 4 Pick. 158; Brooks vs. Barrett, 7 ib. 98; Rohun vs. Hanson, 11 Cush. 44; 7 id. 563; 8 Metc. 64; Caskey vs. Lewis, 15 Ky.; Harris vs. Kent, 11 Ind. 126; Benham vs. News, 2 Cal. 408; Singleton vs. Willets, 1 Nott. & M. 355; Johnson vs. Widner, Dud. (S. C.) 325; Mercer vs. Whall, 5 Ad. & El. (N. S.) 447; Doe d. Bather vs. Brayne, 5 Man. Gr. & S. 655; Geach vs. Ingorsall, 14 Mees. & W. 95; Ashley vs. Bates, 15 id. 589.

But the learned court overlooked the New Hampshire cases—such as Judge of Probate vs. Stone, 44 N. H. 593; Toppan vs. Jenness, 21 id. 232; Belknap vs. Wendell, id. 175; Thurston vs. Kennett, 22 id. 157; Buzzell vs. Snell, 25 id. 478; Chesley vs. Chesley, 37 id. 229; Bump vs. Smith, 11 id. 48; Seavy vs. Dearborn, 19 id. 351. The cases holding it error to deny the right to open and reply to the party holding the affirmative of the issue since the above decision, are Millard vs. Thorn, 56 N. Y. 402; Elwell vs. Chamberlain, 31 N. Y. 614; Lindsley vs. The European Pet. Co. 3 Lans. 176; Colwell vs. Brower, 75 Ill. 516; Bertrand vs. Taylor, 32 Ark. 470; Tobin vs. Jenkins, 29 Ark. 159, and cases pp. 88, 89.

§ 112. Notwithstanding all this, it may very well be questioned whether the position can be supported to its full extent, that the court in banc will never, except in the case of surprise, exercise a remedial power over the decisions of a judge at *nisi prius*, relative to the right to begin. That the judge has a discretionary power necessarily vested in him to a great extent, the case of Hare vs. Munn,(*c*) and that of Crerar vs. Sodo,(*d*) (in the next chapter) distinctly show, and that the court in banc would, most properly, be very slow indeed in disturbing a verdict, on the ground of any error in this respect, must be at once conceded. But the assertion taken to its full extent is rather a formidable
*74 one. Cases may occur, nay, actually *have occurred, (*vide* that of Edwards vs. Jones, *supra* § 32, *ante*,) where the erroneously calling on a plaintiff or defendant to begin, when the real onus probandi lay with his adversary, would tend to the defeat of all justice as completely as the improper rejection or admission of evidence, or the misdirecting a jury could possibly do; and when it is considered that the subject is one of some difficulty, and on which even very able judges have frequently come to erroneous conclusions, it seems too much, in the absence of a positive judicial decision to that effect, to assert that the court in banc will never, under such circumstances, interpose its authority.

§ 113. There is an expression of Lord Tenderden's, to be found in the case of Lacon vs. Higgins,(*e*) viz., "that the plaintiff in that case was entitled to begin, *if he elected to do so*," which would seem to imply that a party might waive his right, and thus throw

(*c*) 1 M. & M. 241. (*d*) 3 C. & P. 10: M. & M. 85. (*e*) 3 Stark. 178.

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also said: "But if the decision had been wrong in this respect, we are not inclined to believe that any judgment ought to be reversed for such an error." This is a mere *obiter*, not a decision on the question, for none was called for. So of Grier's view of the question in Day vs. Wadsworth et als., 13 How. 370, as also that of Justice Strong in Hall et als. vs. Weare, 2 Otto 732, Rosekrans, J., in Fry vs. Bennett, 28 N. Y. 328, and the case of Booth vs. Millus, 15 Mees. & Wels. 669, cited for the dicta in Fry vs. Bennett, where the plaintiff had the affirmative of malice. We wait the action of the court in a case presenting the error explicitly. We are not satisfied with dicta upon cases presenting no error.

the onus of beginning on his adversary. Such is not, however, the fact; no such position is recognized in practice, as, if it were, manifest injustice and inconvenience would result, as appears from the observations already made relative to the discretionary power being vested in either of the litigant parties.(*f*)

Section 2.

Of the Right to Begin in Criminal Cases.

§ 114. In these cases, the practice relative to the right to begin is considerably influenced and simplified by *two* circumstances; first, that in them no damages are ever demanded; and, secondly, *75 that there is little or no special pleading, especially *in cases of treason or felony. It is, however, governed by the same general rule as the practice in civil cases, viz., that the party on whom the onus probandi lies has a right to begin.(1) When,

(*f*) See cases *ante* p. 88, n.

1. If a plea in abatement be demurred to, the State begins on the demurrer, State vs. Rockafellow, 1 Halst. (N. J.) 334, and if the demurrer be overruled the judgment of the court should be that the prosecution abate, Rawles vs. State, 16 Miss. 599. In criminal cases a defendant cannot plead a special plea in addition to a plea of not guilty, Reg. vs. Straham, &c., 7 Cox. C. C. 85; Reg. vs. Skeen, 8 Cox. C. C. 143; 5 Jur. (N. S.) 151; the special plea of *autrefois acquit* or *convict* must be disposed of first, Henry vs. State, 33 Ala. 389; Nonemaker vs. State, 34 Ala. 211; Davis vs. State, 42 Tex. 294.

An indictment clearly bad in law the court ought, on their own motion, to refuse to try. Defendant's counsel, not in a formal argument, but by suggestion *amicus curiæ*, should call the attention of the court to the fact, Rex. vs. Tremain, 5 D. & R. 413; 3 B. & C. 761; Rex. vs. Hipper, R. & M. 210; Rex. vs. Abram, 1 M. & Rob. 7; and whether the court will entertain a motion to quash is discretionary. The actual rights of the prisoner can only be obtained by some kind of plea—abatement or demurrer, &c.—U. S. vs. Stowell, 2 Curt. 153; State vs. Barnes, 29 Me. 561; Com. vs. Eastman, 1 Cush. 189; State vs. Dayton, 3 Zab. (N. J.) 49; State vs. Beard, 1 Dutch. (N. J.) 384; People vs. Eckford, 7 Cow. 535; Click vs. State, 3 Tex. 282. They will never quash if the indictment contain one good count, State vs. Staker, 3 Ind. 570; State vs. Coleman, 5 Port (Ala.) 32; State vs. Mathis, 3 Ark. 84; Com. vs. Hawkins, 3 Gray 463; State

vs. Wishon, 15 Mo. 503; U. S. vs. Potter, 6 McLean 186; Kane vs. People, 3 Wend. 363; but it is said that if one count be stricken out or quashed the indictment is vitiated, Rose vs. State, Minor (Ala.) 28,—so exceptions do not lie to the refusal of a court to quash, State vs. Hurley, 54 Me. 562; State vs. Conrad, 21 Mo. 271. The prosecutor's motion to quash is absolute in the first instance, Reg. vs. Stowell, 1 D. N. S. 320; 5 Jur. 1010, but the court will impose terms, Rex. vs. Webb. 3 Burr. 1468; 1 W. Bl. 460, and will not allow a prosecutor's motion to quash after judgment on demurrer, Reg. vs. Smith. 2 M. & Rob. 109. If the indictment is to be disputed as a valid legal instrument, it may in general be done by motion to quash, set aside the indictment or plea in abatement, as that an indictment was found by a grand jury not legally selected, it will be set aside on motion, State vs. Hensley, 7 Blackf. 324; State vs. McNamara, 3 Nev. 70, that they were summoned by the sheriff without precept; it will be quashed, 5 N. J. L. 539; set aside on motion to quash where the *venires* were unsealed, State vs Lightbody, 38 Me. 200; quashed if it is neither endorsed a "true bill" nor signed by the foreman, Johnson vs. State, 23 Ind. 32.

Any formal pleading to an indictment admits its genuineness, State vs. Clarkson, 3 Ala. 378; but the jurisdiction may be objected to at any time, Rice vs. State, 3 Kans. 141. Pleas in abatement to an indictment must be certain to every intent, 1 Mich. 234; two such pleas may be pleaded at the same time, Com. vs. Long. 2 Va. Cas. 318; they must specifically set forth the grounds of objection, Brenan vs. People, 15 Ill. 511; must state all the essential facts out of which the defence arises, or a negative of the facts presumed in the record, State vs. Brooks, 9 Ala. 10; conclude with a prayer of judgment of the indictment, and that it may be quashed, Findley vs. People, 1 Mich. 234; State vs. Middleton, 5 Port. (Ala.) 484; and signed by the party in person who pleads it, State vs. Middleton, *supra*; and verified, Findley vs. People, 1 Mich. 234; Sayer's case, 8 Leigh (Va.) 722.

Demurrer is the only way to reach the objection that the indictment charges more than one offence; it is no cause for arrest, People vs. Sholwell, 27 Cal. 394; Stephen vs. State, 11 Ga. 225; State vs. Brown, 8 Humph. (Tenn.) 89; this objection is waived by failure to demur, People vs. Burgers, 35 Cal. 115; but if the indictment contain good and bad counts, it may be sustained as to the bad without affecting the good, Turner vs. State, 40 Ala. 21. In Iowa it is said a demurrer to an indictment should be specific, State vs. Groome, 10 Iowa 108, but in Virginia it is held that all imperfections will be reached by a general demurrer, Lazier vs. Com. 10 Gratt. 708.

The rule of civil pleading that the party committing the first fault shall have judgment against him holds likewise in criminal pleading, People vs. Krummer, 4 Park. Cr. 217; State vs. Sweetsir, 53 Me. 438; if the demurrer to the indictment be sustained the prisoner is discharged, but if overruled the prisoner may accept,

State vs. Dresser, 54 Me. 569, and should be allowed to plead Rass vs. State, 9 Mo. 696; McGuire vs. State, 35 Miss. 366; and a plea of not guilty must be entered in all cases in which the defendant does not confess the indictment to be true, Meader vs. State, 11 Mo. 363; Austin vs. State, id. 366. But in misdemeanors the court have a discretion on ovrruling a demurrer to allow the defendant to plead over; they may treat the demurrer as a confession of the facts charged, and render final judgment against the defendant, Rex. vs. Gibson, 8 East 107; McCuen vs. State, 19 Ark. 630; so of pleas in abatement found against defendant, Guess vs. State, 6 Ark. 147; so at common law a demurrer or plea in abatement confessed the facts charged even in felony, and final judgment and sentence will be passed on failure of either, without leave be obtained to plead, Reg. vs. Faderman, 3 C. & K. 359; 4 Cox. C. C. 359; State vs. Wilkins, 17 Vt. 151.

Persons charged with a misdemeanor may, in the discretion of the court, be allowed to plead and defend in their absence, but the court will impose such conditions as will insure submission to the jurisdiction, U. S. vs. Seckie, Sprague 227; Johnson vs. Com., 1 Duv. (Ky.) 244; U. S. vs. Mayo, 1 Curt. 433; and, in general, no step can be taken by defendant on an indictment until he submit himself to the jurisdiction of the court, Sailer ads. the State, 1 Harr. (N. J.) 377; so the sufficiency of an indictment cannot be tested upon a *sci. fa.* on a forfeited recognizance, State vs. Weaver, 18 Ala. 293.

Arraignment is to fix the personal identity of the accused, Hendrick vs. State, 6 Tex. 341; Douglass vs. State, 3 Wis. 820; Harman vs. State, 11 Ind. 311; plea waives arraignment, even in felony, if pleaded in person in open court, and the record shows that fact, Young vs. State, 2 W. Va. 579; Sperry's case, 9 Leigh. (Va.) 623; Goodwin vs. State, 16 Oh. St. 344. At common law, if upon arrignment for lower grades of felonies a defendant stands mute, a jury is empannalled to try whether he stands mute of malice or act of God; and on his trial defendant is entitled to be fully defended by counsel, Rex. vs. Roberts, Car. C. L. 57; and if the jury find he stand mute of malice the court sentence as on a conviction, Com. vs. Moore, 9 Mass. 402; Rex. vs. Mercier, 1 Leach C. C. 183; Rex. vs. Steel, ib. 451; but on an arraignment of one deaf and dumb the indictment is to be read and explained to him by a sworn interpreter, then the trial proceeds as on a plea of not guilty, Com. vs. Hill, 14 Mass. 207.

But under recent statutes, after a jury have rendered a verdict that a defendant stands mute of malice, the court orders a plea of not guilty to be entered of record, Rex. vs. Israil, 2 Cox. C. C. 263; Reg. vs. Schleter, 10 Cox. C. C. 409; but if the prisoner declines to plead, the court may direct a plea of not guilty to be entered without a jury, Reg. vs. Bernard, 1 F. & F. 240; as when a demurrer to an indictment has been overruled, and defendant neglects or refuses to plead further. Thomas vs. State, 6 Mo. 457; Henche vs. People, 16 Mich. 46.

therefore, the general issue is pleaded, the onus lies on the prosecutor to prove all the facts essential to show the defendant's or prisoner's guilt ;(2) and in the few special pleas that are used, such

2. On the plea of "not guilty" it is error to refuse to charge that the burden of showing the truth of the charges is at all times on the State, Black vs. State, 1 Tex. App. 368; 66 Mo. 121; see *ante* p. 14, n.; also, to refuse to charge that the jury must be satisfied "beyond a reasonable doubt and to a moral certainty" of the existence of every fact necessary to establish defendant's guilt, Williams vs. State, 52 Ala. 411; and if an essential element be unproved the court will direct an acquittal, Peop. vs. Bennett, 49 N. Y. 107, and cannot direct the jury to convict, however clear the proof, Howell vs. People, 5 Hun (N. Y.) 620.

The State, when confronted with this plea, has two distinct presumptions to overcome; they have the burden on the face of the pleadings to establish their affirmative; this may be said to be done when a preponderance of proof is shown; but they have also to overcome the presumption of innocence in law, thus requiring evidence, in addition to mere preponderance, that must exclude every other reasonable hypothesis except that of guilt, Martin vs. State, 38 Ga. 293; State vs. Johnson, 19 Iowa 230; and this presumption continues until the State has made out a complete case, Horne vs. State, 1 Kan. 42; see *ante* p. 14, n.; but the defendant's burden is not thus encumbered, as preponderance, merely, is enough to establish a fact in his favor, People vs. Mulgate, 5 Cal. 127; 26 Ohio St. 2; 22 Minn. 206; 49 Vt. 507.

These are inflexible rules, to be applied at the trial only, however, for a person under indictment is deemed guilty for most purposes—arrest, imprisonment, &c., People vs. Dixon, 4 Park. Cr. 651.

There is a further presumption that a party will not confess guilt, and the burden is upon the prosecution to show that the confession of a prisoner, offered in evidence against him, was made after he was properly cautioned, or at least was not obtained by improper means, Barnes vs. State, 36 Tex. 356; Nicholson vs. State, 28 Md. 140; Berry vs. U. S., 2 Col. T. 186; Runnels vs. State, 28 Ark. 121; Earp. vs. State, 55 Ga. 136; Garrord vs. State, 50 Miss. 147; State vs. Jones, 54 Mo. 478; Thompson vs. Com., 20 Gratt. 274; and where the witness did not understand all that the prisoner said to him in making such alleged confession, no part should be allowed in evidence, People vs. Galebest, 39 Cal. 663; he should not be allowed to testify as to impressions made upon the mind of the witness, Peterson vs. State, 47 Ga. 524. Where there is counsel for the prisoner it is said the counsel for the prosecution ought always to open the case; but he should not open if the prisoner has no counsel, unless there is some peculiarity in the facts of the case to require it, Rex vs. Gascoigne, 7 C. & P. 772; and in this opening, counsel will be confined to facts proposed to be proved—can state

as pleas to the jurisdiction, pleas of *autrefois acquit*,(1) *autrefois convict*, collateral issues, such as non-identity, insanity, &c., and

1. The plea of *autrefois convict* is sufficient where the evidence necessary to sustain the second indictment would have sustained the first, and also whenever the proof shows the second case to be the same transaction as the first, Roberts vs. State, 14 Ga. 8; Price vs. State, 19 Ohio 423; Wilson vs. State, 24 Conn. 57; State vs. Keoeh, 13 La Ann 243; although offence called by different names, Holt vs. State, 38 Ga. 187; Com. vs. Goodenough, Thach. (Mass.) Cr. Cas. 132; Com. vs. Foster, 3 Mete. (Ky.) 1; Com. vs. Miller, 5 Dana 320; Winneger vs. State, 13 Ind. 540; and whenever a person shall have been given in charge, on a legal indictment, to a regular jury, and that jury are unnecessarily discharged, he has been once put in jeopardy, and the discharge is equivalent to a verdict of an aequittal, Wright vs. State, 5 Ind. 290; McCorcle vs. State, 14 id. 39; Heikes vs. Com., 26 Pa. 513; U. S. vs. Shoemaker, 2 McLean 114.

On all these proceedings the right to go forward will belong to the party who has assumed the onus upon the plainest applications of the rules laid down previously in this treatise. On the plea *autrefois acquit*, defendant must begin on the authority of Rex vs. Parry, 7 C. & P. 836.

By the plea of guilty, defendant confesses himself guilty in manner and form as charged in the indictment, and if the indictment charges no offence against the law, none is confessed, Fletcher vs. State, 12 Ark. 169; and the plea of *nolo contendere* has the same effect, except that when pleaded with a protestation of innocence it will not conclude the defendant from disputing in a civil action the

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confessions of the prisoner proposed to be proved, if in a condition to prove them, otherwise not, Rex vs. Davis, 7 C. & P. 783; Rex vs. Hartel, id. 773; and if additional evidence be discovered, after the opening and before State's evidence be all in, the evidence must be put in without any additional opening of them to the jury, Reg vs. Courvoisier, 9 C. & P. 362; but if the counsel for the State does not, in his opening, disclose a case against the prisoner, he cannot use statements made by the prisoner, except in evidence, Reg vs. Gardner, 9 Cox C. C. 332. In criminal prosecution it is not competent to the prosecutor to appear and conduct the case in person, Reg. vs. Gurney, 11 Cox C. C. 114; and if he be examined as a witness to support an indictment, he has no right to address the jury as counsel, Rex vs. Brice, 2 B. & A. 606; 1 Chit. 352.

It is a general principle of criminal procedure that counsel for the prosecution should consider themselves not merely as advocates of a party, but as ministers of justice, and not as struggling for a verdict, but as assistants in the ascertainment of truth according to law, Reg vs. Berens, 4 F. & F. 842; Reg vs. Hursfield, 8 C. & P. 269.

the special plea in answer to an indictment for not repairing a highway, that others and not the parish are bound to do so; we have only to keep in mind the general principle, and apply it. It has been said that in general the party who adds the similiter has to begin. Archbold's Q. S. 127.

Section 3.

Of the Right to Begin in Appeal at Quarter Sessions.

§ 115. By several acts of parliament, a right to appeal to the Court of Quarter Sessions is given against various acts, judicial or ministerial, of magistrates, parish officers, &c. In these pro-

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facts charged in the indictment, Com. vs. Horton, 9 Pick. 206; and a plea of not guilty by several defendants is in law a several plea, State vs. Smith, 2 Ired. (N. C.) L. 402; and by this plea all mere formal objections to the indictment is waived, Guykowski vs. People, 2 Ill. 476; and in general, an indictment cannot be impeached by plea or evidence at the trial, People vs. Halbut, 4 Den. 133.

The defendant, of course, has the same right to open the facts of his defence before the jury; and he may do it in person or by counsel, and counsel will not be allowed to appear for the prisoner without his consent, Rex. vs. Southey, 4 F. & F. 864; Reg. vs. Ysenado, 6 Cox. C. C. 386; but on trials for felonies, prisoners defended by counsel ought not to be allowed to make a statement to the jury in their defence, Reg. vs. Manzano, 8 Cox. C. C. 321; 2 F. & F. 64; 6 Jur. (N. S.) 406; a prisoner will be allowed to make his own statement to the jury, but his counsel cannot, as of right, address the jury for him, Reg. vs. Taylor, 1 F. & F. 535; Reg. vs. Boucher, 8 C. &. P. 141; Reg. vs. Burrows, 2 M. & Rob. 124, without permission of the court, Reg. vs. Stevens, 11 Cox. C. C. 669; Reg. vs. Malins, 8 C. & P. 242; and where defendant opens the cause in person and examines and cross-examines witnesses, his counsel may argue points of law for him, Rex. vs. Parkins, 1 C. & P. 548; R. & M. 166; Rex. vs. White, 3 Camp. 98; but no more than two counsels are entitled to address the court for a prisoner during the trial on a point of law, Reg. vs. Bernard, 1 F. & F. 240.

The prisoner's counsel, in opening, will not be allowed to state anything which he is not in a situation to prove, or which is not already in proof, Reg. vs. Beard, 8 C. & P. 142; Reg. vs. Butcher, 2 M. & Rob. 228. The rights and duties of counsel will be further considered under "Reply," chap. 111.

ceedings it may be said, in general, that it lies on the respondent to begin and prove his case; but as they differ very much in their nature and subject-matter—the onus probandi in some lying on the appellant, though, in the majority, on the respondent—the above rule is by no means of universal application.

Owing to the fact that the decisions of the Sessions, in all matters brought before them by appeal, is final, and cannot be reviewed or questioned even by the Court of Queen's Bench, unless they think proper to send up a case for its consideration; *76 and as this latter case has occasionally exhibited *an unwillingness to interfere or decide upon questions which merely relate to the *practice* at Sessions,(*g*) it has followed that the practice at these courts throughout the kingdom has been, hitherto, in many respects, anything but uniform. However, as the Queen's Bench has, in some important instances, abandoned its reluctance to interfere in this respect, and pronounced some decisions which have been leading cases on the subjects to which they refer, and been generally followed by the Courts of Quarter Sessions throughout the kingdom, it is to be hoped that by a perseverance in the same course, and laying down some general rule when any point of this description presents itself, a uniformity in the practice of those tribunals will ultimately be established.(*h*)

§ 116. Appeals may be brought to Sessions on any of the following subjects:—1. Against poor's rates. 2. Against orders of removal. 3. Against the appointment of overseers of the poor. 4. Against the allowance of overseers' account. 5. Against the disallowance of overseers' accounts. 6. Against county rates. 7. Against orders for stopping up highways. 8. Against proceedings under inclosure acts. 9. Against convictions of magistrates. And of these we propose to treat in their order.

(*g*) Rex vs. Newbury, 4 T. R. 475; Rex vs. Justices of Suffolk, 6 M. & S. 57.

(*h*) Lord Kenyon, in Rex vs. Newbury, *supra*, said: "In writs of error and appeals to the House of Lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision below always begins; but in a case of this kind, (an appeal against a poor rate,) where it is an *ex parte* proceeding, and where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence. However, where objections of form are raised to convictions for matter apparent on the face of them, the appellant's counsel begins," &c. See R. vs. Knill, *infra* § 121.

In appeals against poor's rates it has been laid down by the Queen's Bench, and seems generally understood to be the practice, that where the ground of appeal is that the appellant has no ratable property within the parish, and consequently ought not to be rated at all, that (after the notice of appeal has been produced, or not called for) it lies on the respondent to begin; but that where the appellant admits that he has property in the *77 parish, and consequently *his general ratability, but disputes the quantum, and complains either that he has been rated too high, or other parties too low, that there he must begin, as the onus of reducing the rate clearly devolves upon him. And where the appeal is in the alternative, viz., that the party is not ratable at all, but even if he be not to the amount imposed, it still lies on the respondent to begin; for "where the appeal comes on to be heard, naked and destitute of all evidence, before the court, those who have done the act ought to establish the propriety of it by evidence." Per Lord Kenyon, C. J., in Rex vs. Newbury, 4 T. R. 476.

§ 117. Where the onus of proving both the ratability and the quantum of rate lies on the respondents, it is not sufficient for them to prove that the appellant has *some* ratable property in the parish, in order to transfer to him the onus of showing that he is overrated; they are bound to go farther, and show some probable ground to justify them in the amount for which he has been rated.

§ 118. This is well illustrated by the case of Rex vs. Topham.(*i*) There the appellant was rated as occupier of property of the annual amount of £250, and the grounds of his appeal were, that he had no ratable property in the parish, and not to the amount to which he was rated. The respondent having begun and proved that the appellant was in the annual receipt of certain tithe rents, originating in an inclosure act, of the annual value of 6s. 8d., and that other sums, of the amount of which no proof was given, were received by him for tithe rents, closed their case, and contended, that as they had proved the appellant to be in

(*i*) 12 East. 546.

possession of *some* ratable property, it lay on him to show that he was overrated. It appeared that the appellant was lessee of the prebendary of D., who was entitled, under the inclosure act, to a *78 yearly rent or composition in lieu of the *tithes of corn, grain and hay therein, of £267; to be paid by the owners and proprietors of certain lands in certain proportions: and by the act, in all future rates and levies in the said townships, the composition rents were to be assessed in the same proportion as the other landholders. On this case coming before the King's Bench, Lord Ellenborough, C. J., said: "The question is, whether a person, who I will suppose for the present is liable to be rated for something beyond the 6s. 8d., can be rated to the amount of £250, and then left to pare down the assessment, upon an appeal, to the amount to which it ought to be? He might as well have been charged to the extent of £50,000. When the question before the Sessions is upon the quantum of the rate, the officers making it must show to the justices some probable ground for the amount at which they charge the party in the rate. The mischief of any other rule would be enormous; a small occupier might be rated at once in the round sum of £1000, and left to struggle his way out of the charge as he could." Decision accordingly.

§ 119. It seems, also, that when a party appears against a rate, on the ground that others have not been rated who were liable to be so, he is not bound to furnish the Sessions with materials to enable them to amend the rate. Thus, in Rex vs. Hull Dock Company,(*k*) where the appellants objected to a rate, on the ground that certain ship-owners were not rated for their ships, it was said, per Abbot, C. J.: "It was pressed on us in the argument, that as the appellants had not made out what was each ship's profit, they had not given to the Sessions the means of amending the rate; but this is founded on a misapprehension of the duties of the parish officers and the appellant. Where prroperty is ratable, it is the duty of the officers to include it in the rate, and to take what means they can to ascertain its value. It is not *79 *for them to omit it altogether, and to cast upon the appel-

(*k*) 5 B. & C. 516; 5 D. & R. 350.

lant what is properly their duty, the burden of proving its value. In cases of single omission, the difficulty might not be very great; but if all the property of a given description is omitted, the difficulty must be excessive.

§ 120. Before 41 Geo. III, c. 23, the omission of a single individual, who ought to have been included, compelled the Sessions to quash the whole rate, and so as he was ratable at all, the extent to which he was ratable was not in question. The 41 Geo. III requires the Sessions to alter or amend a rate appealed against, without quashing it, but with proviso that if the Sessions shall think it necessary, for the purpose of giving relief to the appellant, to quash the rate, they may do so; and when a rate contains so many omissions that it can hardly be expected of an appellant that he should have evidence to show the extent to which each person omitted ought to be rated, and where the investigation before the Sessions would be likely to exhaust more time than they could reasonably be required to give up, we think it would not be an improper exercise of their discretion to quash the rate, and make the officers do in the end what they ought to have done in the beginning."

§ 121. In appeals against orders of removal, a practice, it seems, formerly prevailed at some Courts of Quarter Sessions, to require of the appellant to show, in the first place, the settlement of the pauper out of the appellant parish.(*l*) The course, however, was strongly and justly condemned by an able writer, as being contrary to all principle, (2 Poth. 146,) and the practice at last totally abandoned; for we since find it clearly established as a principle, that (after proof of notice, if required) the respondents were always entitled to begin, Rex vs. Knill,(*m*) and even, though the appellant at the trial chose to admit a *prima facie* *80 case *in the respondents, and in fact began, yet the case was always treated as if the respondents had begun, and they

(*l*) Rex vs. Wolford, Cald. 236.

(*m*) 12 East. 50, which was a case upon an appeal to the Sessions against an order of affiliation. Ruled that the respondents must begin by supporting their order.

were cited to the general reply.(*n*) It has, however, been recently enacted by 4 & 5 W. IV., c. 76, s. 81, that "The overseers or guardians of the appellant parish, &c., shall with such notice, *i. e.*, of appeal, or fourteen days at least before the first day of the Sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing, under their hands, of the grounds of such appeal, &c.," and it has been argued that if the appellants, in the statement so furnished, do not deny the respondent's case, as stated in the examination, they thereby admit it, and the respondents are not bound to prove it; and therefore, that under these circumstances, the appellants have a right to begin; and it is said that it has been so ruled at one or two Courts of Quarter Sessions.(*o*)

§ 122. This proposition, however, is at least questionable, and is a subject which a decision of the Court of Queen's Bench will be requisite in order to settle; the reader may see the question discussed in the work of Mr. Archbold already quoted, who certainly argues with considerable ingenuity in favor of the position, that the notice of the grounds of appeal admitting the *prima facie* case of the respondent, does *not* shift the onus probandi, or entitle the appellant to begin, and concludes by saying "that it is useless to discuss the question further; probably some case will shortly be decided upon the point by the Court of Queen's Bench, and until that takes place, each Court of Quarter Sessions will adopt a practice in this respect according to the particular view *81 it may take of the subject." *Vide* Arch. Q. S., in loc. cit.*

§ 123. In appeals against the appointment of overseers of the poor, whether by a person appointed or otherwise, it seems that the general rule prevails that the respondent shall begin.(*p*)

In the case of a party appealing against the allowance of overseers' accounts, Mr. Archbold says: "I believe it is usual at most Sessions for respondents to begin; by the notice of appeal they are apprised of the items objected to, and of the grounds of objection to them; if the appellant, by his notice, say that the

(*n*) Arch. Q. S. 303, and *infra* §§ 162, 163. (*o*) Arch. Q. S. 281. (*p*) Arch. Q. S. 339.

payments charged were not in fact made, the respondents may prove that they were; if the appellant object to their legality on certain grounds, the respondents may show that the objection does not apply, or is unfounded in point of law." Arch. Q. S. 343. And with respect to appeals against the disallowance of those accounts: "There are no cases, and very little practice in this kind of appeals, from which any rule can be deduced as to whether the appellant or respondent shall begin; the general rule in appeals is, that the respondent shall begin; and it will be best, perhaps, to adopt that rule in this particular case, especially if the justices have not stated, at the foot of the account, their reasons for disallowing or reducing the items in question; for the appellants may not know in what manner to sustain the items objected to, until the respondent apprise them of the objections."(q)

§ 124. When a general rate is made on a whole county, under 12 Geo. II, c. 29, for the various county purposes, to be assessed on every town, parish, or place within it, an appeal is given by the same statute to any town or parish which may deem itself overrated, against such part of the rate as affects them, leaving the rest untouched. In such appeals it is manifest that the onus probandi—*i. e.*, the showing that they are overrated—lies on the *82 appellants; and accordingly *it is the established practice for them to begin, and prove how they are injured by the rate.

§ 125. By 5 & 6 W. IV., c. 50, s. 84, a power is given to two justices, under certain circumstances, and after complying with certain forms, to certify, under their hands, that certain highways ought to be stopped altogether, as unnecessary, or that the courses of them should be changed into others more commodious for the public, and to transmit the certificate to the clerk of the peace, who shall read it at Sessions, and have it enrolled there among the records of the county. The same statute also gives an appeal to the Sessions to any party who may consider himself aggrieved by the stopping up or diverting any such highway; the questions of fact in which appeal, unlike all others at Sessions, shall be determined by a *jury*, and not by the justices.

(q) Arch. Q. B. 364.

Here, also, it is obvious, that the onus probandi and right to begin lie upon the appellant.

§ 126. By the General Inclosure Act, (41 G. III., c. 109, s. 3,) and the acts amending it, (1 & 2 G. IV., c. 23; 3 & 4 W. IV., c. 35, s. 3,) a right to appeal to the Sessions is given in certain cases. And the local inclosure acts generally give the same right to any person who may consider himself aggrieved by the determination of the commissioners under them. This is another of those cases where it devolves on the appellant to begin, as the onus lies on him to show how he has been aggrieved.

§ 128. In appeals against convictions by magistrates, the appellant's objection to the conviction may either be one of *form* or one of *substance*. Convictions are frequently quashed for want of form, and then it becomes unnecessary to go into the merits of the case. But if there be no formal objection taken, or such as are taken are overruled, then, as the conviction is for some offence against the law, of which the appellant contends he is not *83 guilty, he is *accordingly in this, as in all other criminal proceedings, entitled to a presumption of innocence in his favor, and the onus of proving his guilt lies on the respondents. They, in this case, therefore, are always called upon to begin and show how the appellant has been guilty of a breach of the law.(r)

(r) The chairman has the same right to vote as any other justice present, but has no casting or double vote in case the numbers, including his own vote, should be equal; for *inter pares non est potestas*, Dickson's Q. S. 617.

CHAPTER III.

OF THE RIGHT TO REPLY.

§ 129. The general rule on the subject is thus very correctly stated in some old books: "The counsel of the party which doth begin to maintain the issue, whether of plaintiff or defendant, ought to conclude." Vin. Ab. Evidence, S. a. 7, cites L. E. 5, pl. 11; Trials per Pays 229.(1) Accordingly it is immaterial

1. Litigants have a constitutional right to appear in a cause and be represented by counsel; and the fullest liberty and range of argument should be allowed. In criminal cases this constitutional right means only a hearing upon the facts duly presented in evidence, Wilson vs. State, 3 Heisk. (Tenn.) 232. Upon a question of law addressed to the court, it is discretionary whether they will hear an argument, Howell vs. Com., 5 Gratt. 664. Dr. Minor, in his Inst., vol. 4, p. 734, says: "If instructions from the court are to be asked for, they *ought* to be submitted before the argument is commenced, so that the law of the case may be in the minds of the jury during the discussion. And when, in a civil case, the opinion of the court is expressed upon any legal point arising in it, that opinion is not to be controverted by counsel, but a bill of exceptions should be taken, Delaplane vs. Crenshaw, 15 Gratt. 457. But in the discretion of the judge he may postpone an instruction until after the argument, or may allow it then to be asked for, Balt. & O. R. R. Co. vs. Polly, 14 Gratt. 447." See *ante* p. 40. Within the limits of the testimony, and the declarations of law, the right of argumentation, illustration and comment is free, and they have a right, by way of illustration, to read extracts from works on science, not given in evidence, but not use them as a pretence of getting improper matter before the jury as evidence, Legg. vs. Drake, 1 Oh. St. 286, or a new trial will be granted, Baldwin's Ap., 44 Conn. 37. In criminal cases they may argue to the jury the law as well as the facts, Lynch vs. State, 9 Ind. 541; Kane vs. Com. May, 1879, Pa.; State vs. Crotean, 28, Vt. 14; U. S. vs. Wilson, Baldw. 99; see *ante* p. 34; and for this purpose may read extracts from law writers—informing the jury that they are to be so regarded, and not as evidence, Harvey vs. State, 40 Ind. 516. Yet, when counsel in a criminal case have requested the court to state the law, they have no right to argue to the jury that the instructions thus given were erroneous, Edwards vs.

whether the onus probandi and the right to begin originally lay on the party affirming or the party denying, or whether that party were plaintiff or defendant; in any case he who begins ought to conclude.

§ 130. This principle, like that which throws the burden of proof on the party who makes the affirmative allegation, is by no means confined to legal proceedings, nor is there anything arbitrary in its nature. We find it allowed, in all discussions in parliament and elsewhere, that the proposer of any question or the opener of any discussion has a right to make a speech in reply,

State. 22 Ark. 253; Davenport's case, 1 Leigh. (Va.) 588. But in civil cases counsel have not the right, generally, to either quote or argue the law to the jury, except by way of statement or hypothesis, as they must take the law from the court, Fuller vs. Talbot, 23 Ill. 357; Butler vs. Slam, 50 Pa. St. 456; Good vs Mylin, 13 id. 538; State vs. Klinger, 46 Mo. 224; Sprague vs. Craig, 51 Ill. 288; Philpot vs. Taylor, 75 Ill. 309.

The freedom of argumentation does not extend to the assumption of facts not in evidence as the basis of argument. It is the duty of the presiding judge to interpose *sua sponte*, especially if his attention is called to the impropriety, Perkin's Adm's vs. Gay, Miss. Feb'y. 4, 1878; 5 Report'r 399; 11 Ga. 633; 10 id. 511; 25 id. 227; Cook vs. Ritter, 4 E. D. Smith, (N. Y.) 253; Rolfe vs. Rumford, 66 Me. 264; Gould vs. Moore, 40 N. Y. Superior Ct. 387. The court may properly refuse to allow the plaintiff's counsel to argue a case before a jury when there is no evidence in the cause, legally sufficient from which they could find a verdict for the plaintiff, Hodges vs. Ackerman, 11 Ex. 214; 24 L. J. Ex. 257; Bankard vs. Balt. &c. R. R. Co., 34 Md. 197; but that counsel testified as a witness is no reason why he should not sum up, Branson vs. Cauthers, 49 Cal. 375.

When the counsel in the closing argument endeavors to influence the minds of the jury by reference to matters not in proof before them, it is the duty of the presiding judge to interfere and repress the reprehensible practice, Read vs State, 2 Ind. 438; Tucker vs. Henniker, 41 N. H. 317.

There is a just distinction between the effect and use of comments upon assumed evidence *which does not exist*, and the *non-introduction of appropriate evidence* by the opposite party when it obviously does exist; so the non-introduction of a settlement, in which it is relied that a note, the subject of the action, was brought into account and satisfied, is a proper circumstances for comment before the jury, on the trial for the recovery for the amount of the note, Chambers vs. Brigman, 68 N. C. 274. On an issue whether an indorsement was genuine the

after the opposite party has been heard; and it is based on this obvious prineiple of justice, that he who is heard first cannot possibly know what arguments will be urged or what proofs will be resorted to by the other side; and however ingenious those arguments or however plausible those proofs, still he may, if heard in reply, be able either to refute them altogether, or explain them in such a way as to render them consistent with the case he has in the first instance advocated.

§ 131. Such is the general principle, but in practice some limi-
*85 tations *have been placed to the privilege. It is obvious that the respondent or defending party must, in his answer to the

maker testified that, among other notes endorsed for him by the defendant in their business transaction, was one corresponding in date and amount to the note in suit, and that these transactions were entered in his books of account, which were in the defendant's possession. *Held*, that the plaintiff might comment to the jury on the defendant's omission to put the books in evidence. Huntsman vs. Nickols, 116 Mass. 521. So a defendant's sworn plea may, in argument, be commented on as a sworn statement, and may be compared with his testimony to disparage it, McLendon vs. Frost, 57 Ga. 448.

But, on the other hand, parties are quite excusable in abstaining from giving their own evidence if they deem it not absolutely essential, because interest always does and must subject it to more or less suspicion, Anderson vs. Russel, 34 Mich. 109. So it is held a privilege, and not a duty of party to an action, to offer himself as a witness in his own behalf; and the fact that such privilege is not exercised is not the subject of comment before a jury, Gragge vs. Wagner, 77 N. C. 246; 63 N. C. 53; but if a party actually declines to testify upon what he knows pertinent to his cause, it is a circumstance for the consideration of the jury, and the omission of the defendant in a criminal case to call, as a witness, a person in his employ and interest, who could probably explain facts already proved, tending to show the defendant's guilt, if capable of being explained favorably to the defendant, may properly be commented on, Com. vs. Clark, 14 Gray 467.

The speech of the plaintiff's counsel, in opening the case, should be limited to a fair statement of the nature of the case and the facts he expects to prove, such as is proper to enable the court and jury to understand the bearing and relevancy of the evidence as it may be offered, Wicks vs. Smith, 18 Kans. 508; and for him to read documents which he may intend to offer in evidence is improper, for it tends to bring them to the knowledge of the jury before the court has had oppor-

case of the opener, adopt one of these three courses: 1. He may state his case to the jury, and give evidence to establish it. 2. He may confine himself to addressing the jury and commenting on the facts already put in evidence on the other side, but neither adduce any new evidence himself or state any new facts material to the question. 3. He may in his speech state some new facts or circumstances not previously proved on the opposite side, but adduce no fresh evidence to establish them. These three predicaments shall be considered in their order.

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tunity to decide on their admissability, Scripps vs. Rielly, 35 Mich. 371, or the test of cross-examination, Baldwin's appeal, 44 Conn. 37.

The length of time to be occupied in discussion, and the determination of the legitimate questions for argument, must necessarily be left to the sound and legal discretion of the judge presiding, Dobbins vs. Oswalt, 20 Ark. 619; Brooks vs. Perry, 23 id. 32; Cory vs. Silcox, 5 Ind. 370; State vs. Page, 21 Mo. 257; Freleigh vs. Ames, 31 Mo. 253; Trice vs. Hanibal, &c., R. R. Co., 35 id. 416.

As to the *legal discretion* the court says, in Dille vs. State, 34 Ohio St., 8 Reporter 693: "The court has no discretionary power over the right itself, for it cannot be denied. And hence it has no right to prevent the accused from being heard by counsel, even if the evidence against him be clear, unimpeached and conclusive in the opinion of the court. But the exercise of that right is subject to judicial control to the extent that it is necessary to prevent the abuse of it. The point seems to be so well settled in this country that it is needless to cite authorities from other states upon it. It is the practice in this state, so far as I know, to allow a person accused of felony to be heard by two counsels if he so desires. If a prisoner is unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to the accused at all reasonable hours. This may be regarded as an expression of legislative intent on the subject.

There were seven witnesses for the State and four for the defendant. It was entirely circumstantial, and there was serious conflict in it. Under these circumstances, when the defendant's liberty was at stake, and an ignominious punishment threatening him, he was entitled to be heard in a reasonable manner by both counsel whom he had employed for his defence. His counsel sufficiently indicated that in their judgment the thirty minutes allowed for argument was insufficient, by promptly protesting against it, and the defendant saved his right by excepting to the limitation at the time it was imposed. A majority of the court finds that a limitation upon the argument was such an abuse of the power of the judicial control over the subject as deprived the defendant of a fair trial." Reversed and remanded. See Word's case, 3 Leigh. (Va.) 743.

§ 132. It is universally admitted, and in every day's practice, that when the defendant or party who is to speak second, calls witnesses or puts in any evidence to the issue, that the counsel who began has, what is called, a right of *general* reply, *i. e.*, he may reply on the whole case as it then stands before the jury, and is not confined to answering those fresh portions of evidence which have been adduced by his adversary.(1) It is immaterial whether

1. There is a necessary distinction between a *general* and a *special* reply. We shall endeavor to develop this distinction in the light of several cases, Ryon, C. J., in Brown vs. Swinford, Wis., 1878, 6 Reporter 639, said: "It appears by the bill of exceptions that the counsel for the plaintiff waived the opening argument to the jury. A very strict rule might hold this to give the other side the right to close. If such a waiver should still leave the closing argument to the plaintiff, it certainly confined it to a strict reply to the defendant's argument—*excluding general discussion of the case.* If the party entitled to the opening argument, relying on the strength of his case without discussion, waive the right to *discuss the case generally*, he should not be permitted to do so out of his order, and after the mouth of the other party is closed. His close, if permitted to close the argument, should be limited to comments on the other side. This is essential to the fairness and usefulness of judicial discussion at the bar."

In Barden vs. Briscoe, 36 Mich. 257, Campell, J., says: "It appears from the bill of exceptions, that after the parties had rested the case, counsel for the plaintiff opened the case to the jury, and occupied less than one hour in making and opening argument, and that he closed said opening argument as far as he desired then to do. The counsel for the defendants stated that they should only address the court on questions of law, and should not address the jury, who were allowed to be absent during the legal arguments. When these were closed the counsel for the plaintiff desired to make a closing argument to the jury on the facts, but the court refused to permit him to do so.

"It is certainly important to the administration of justice that no one be deprived of full benefit of counsel. And it ought not to be allowed to counsel by any strategy or artifice to prevent a fair hearing. But it is necessary, in considering this matter, to regard the ordinary course of procedure. Usually the plaintiff's opening must indicate what the defendants are expected to meet. They have a right to know what arguments are to be used against them, and this they can only learn from the opening, inasmuch as they have no reply. In most cases, if they do not think the opening requires any arguments to fortify their case against it, they may fairly let the case go to the jury as it stands, and no reply is needed where there is nothing to reply to.

the evidence thus adduced be entirely verbal or entirely written, or partly verbal or partly written, or be trifling, insignificant, or

"But while this is true in theory, it is also true that when all the testimony is in, the defendants know perfectly well before the opening what the line of argument against them must be, and that its effect upon the jury will depend more or less upon the skill and force of opposing counsel in presenting the facts.

"As only one counsel opens, and as when there are more than one, the ground is usually divided, and the junior usually proceeds, the effect of cutting off a reply, may be to prevent the whole case from being thoroughly presented. We cannot think there is any absolute right in the defendant to produce such a result. Every court is bound, in fairness, to prevent such abuses. But inasmuch as the propriety of interference must depend upon circumstances, we think the matter comes within those discretionary rules which must, unless in extreme cases, leave the trial judge to determine the course of procedure."

In Lyre vs. Morris, 5 Harr. (Del.) 3, the evidence closed; plaintiff's counsel opened; defendant's counsel declined; plaintiff's counsel desired to address the jury on the facts again; which was refused.

In Wynn vs. Lee, 5 Ga. 217, the court lays down the rule generally that in a trial before a jury, the party entitled to the conclusion should state to opposing counsel, before the latter addresses the jury, the grounds in the pleadings upon which he expects to rely, and the points of law he intends to make to the court, and shall read or present to him the authorities which he intends to use; and the counsel, in conclusion, shall be confined in his argument to the grounds, points and authorities thus exhibited. In Cutter vs. Thomas, 24 Vt. 647, it is laid down that the party who merely refers to cases in his opening argument, without reading, is understood to acquiesce in such authorities not being read; and unless they are read by the opposite side he is not strictly entitled to take them up again.

In Morales vs. State, 1 Tex. App. 494, the court says: "Counsel for the State, in his opening address to the jury, should fairly develop his case, and state the law on which he relies. If he defers this till his second address, the presiding judge may allow the defendant's counsel to reply, and afterwards permit the State's counsel to close the argument."

The party entitled to the general reply is entitled to comment—1st, upon the grounds, points and authorities upon which he has laid the proper foundation in his opening, Wynn vs. Lee, *supra*; 2d, by way of distinguishing away, controverting and nentralizing the case as set up by the responding party, without introducing new matter, unconnected with the defence and not tending to controvert or disprove it, conforming in all respects to the rule for producing *evidence* in reply, *ante* p. 82. This is general reply.

A special reply is a reply which includes only the second branch of the general

insufficient in itself to answer the purpose for which it was given; so as it is legal evidence, such as can be left to the jury, it equally gives the opener the right of general reply.(*s*)(1)

(*s*) Per Lord Mansfield, C. J., Rex vs. Horne, 20 Ho. St. Tr. 662. And see, for examples, Doe d. Chamberlayne vs. Lloyd, Peak Ev. 5; Bulford vs. Croke, id.; Hodges vs. Holder, 3 Camp. 363; Jackson vs. Hesketh, 2 Stark. 518; Bedell vs. Russell, R. & M. 293; Cooper vs. Wakely, 3 C. & P. 474; M. & M. 273; Cotton vs. James, 3 C. & P. 505; M. & M. 273; Jones vs. Brearly, 5 C. & P. 319; Arch. Q. S. 248; Buzzell vs. Snell, 25 N. H. 474; Belknap vs. Wendell, 21 id. 175; Chesley vs. Chesley, 37 N. H. 229; Huntington vs. Conkey, 33 Barb. 218; Lexington, &c., Ins. Co. vs. Paver, 16 Ohio 324; Tobin vs. Jenkins, 29 Ark. 151; Colwell vs. Brower, 75 Ill. 516; *ante* pp. 83, 89, 90.

1. Admissions in the pleadings will have the same effect; as if a cause be submitted on bill, answer, and general replication, and no evidence be offered, defendant is entitled to the conclusion, Fall vs. Simons, 6 Ga. 265; for by the general replication the complainant admitted the sufficiency of the answer in point of law to bar the action, Slater vs. Maxwell, 6 Wall. 275; Story Eq. Pl., § 697; Flagg vs. Bonnell, 2 Stock. 85; Miller et als., vs. Wack et al., Sax. 209; Bogardus vs. Trinity Church, 4 Paige 178; Briggs vs. Peunman, 8 Cow. 387; and the only question, then, was

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reply, *supra*, and excludes the first, Brown vs. Swinford, Morales vs. State, *supra;* as in the case of Arden vs. Tucker, *infra* § 162, and Brown vs. Swinford, *supra;* Harvey vs. Mitchell, 2 M. & Rob. 366. The learned judge, in the case of Barden vs. Briscoe, *supra*, is sensitive to the "strategy" of responding counsel refusing to sum up a defence after an indicated partial opening. He admitted that in theory so much of the opening as was not opened might be deemed waived. But the "strategy" of the opener, in arranging for the weight of his discussion after the responding counsel's mouth is closed, is an "artifice" to which he appears to be more oblivious than the court in the case of Morales vs. State, *supra*. The simple fact of two counsel being employed by the plaintiff is not the least excuse for allowing a reply to be tortured into an opening. The distinctiveness of a reply should be maintained to preserve the fairness and usefulness of judicial discussion. The case of Tyre vs. Morris, *supra*, is decided correctly, and the refusal of the court to permit a reply to be perverted into a second opening is the only practice to rebuke the reprehensible trick of a partial opening. The principle of compelling a complete opening cannot be sacrificed to mere convenience, and so far as the case of Barden vs. Briscoe, teaches any other doctrine, it cannot be recognized. The discussion of the court is one-sided, and that on the wrong side. The affirmative must be maintained by a convincing preponderance, by open, fair and ingenuous proof, after a complete opportunity for full defence; so that if it turn out that the plaintiff makes out a case as consistent with the defence as his recovery, he fails to make out a case, Wheelton vs. Hardisty, 8 E. & B. 263; Cotton vs. Wood, 8 C. B. N. C. 568.

§ 133. Accordingly, in the case of Rymer vs. Cook and others,(*t*) which was an action of assumpsit to which the general issue had been pleaded; where, in order to prove part payment, the defendants relied on the particulars of demand which had been given under a judge's order, [Note—This was before the rule of T. 1 Will. IV., which requires the annexation of the particulars to the declaration,] in which the plaintiff had given the defendant credit for certain sums paid, the plaintiff claimed a right to reply, and contended that the particulars of demand should be considered as evidence put in by the defendant of admissions by the plaintiff, and that they could only become admissions by the defendant's admitting the other side of the account; and per Pollock, B.: "I should have received evidence of the admission without proof of the judge's order, on proof of the handwriting of the plaintiff's attorney; we may therefore withdraw the judge's order altogether, and then this becomes merely an admission, requiring proof as other admissions do: I am certainly of opinion that it is the defendant's evidence:" and (after consulting Bayley, J.) allowed the reply.

§ 134. It was commonly supposed, that in those classes of criminal proceedings in which a prisoner is allowed to produce evidence of his having borne a good character previous to the time of the supposed offence, and thereby endeavor to raise a presumption in favor of his innocence, that this was not such a producing of evidence as entit ed the prosecutor's counsel to reply; at least it is certain that such reply was seldom, if ever, made in practice. But the point has lately received a regular judicial decision in the case of Rex vs. Stannard and others.(*u*) Here the prisoners were *87 indicted for robbery, and the *opinion of the court was

(*t*) M & M. 86. (*u*) 7 C & P. 673.

its establishment by proof; and having the burden of proof he ought to conclude; and it is also held that the proofs on the affirmative, in order to confer the reply, must support them instead of negativing them, 5 City H. Rec. (N. Y.) 63; Young vs. Hayden, 3 Dana. 145; Vanzant vs. Jones, id. 464; see Hodges vs. Ackerman 11 Ex. 214; 24 L. J. Ex. 257; Chambers vs. Hunt, 3 Harr. (N. J.) 339.

asked whether the prosecuting counsel had a right to reply, as the prisoners had only called witnesses to character; and per Patterson, J.: "I am very sorry this question has been raised, but if I am driven to give an opinion, I must say that I think the counsel for the crown has a right to reply where any witnesses are called for the defence, whether to facts or to character.

§ 135. I cannot in principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty; the object of laying it before the jury is to induce them to believe from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case (1)," and Williams,

1. The presumption of a character of ordinary fairness, with which the law for the purposes of trial clothes a person accused of crime, is one to which he is entitled, and which cannot be put in peril unless he, by introducing testimony in reference thereto, elects to put it distinctly in issue, and on a trial of murder, proof of the general character of the accused is not received, even on his own behalf, the inquiry in such cases being confined, when pertinent at all, to the general character as to the trait involved in the offence charged, People vs. Fair, 43 Cal. 137; and the State will not be allowed to rebut the presumption of general good character by evidence of particular facts; the inquiry must be general as to the trait involved in the indictment, Com. vs. O'Brien, 119 Mass. 342; 116 Mass. 350; so it will be seen that the presumption of good character must be rebutted by facts, and evidence that the accused was in company of one committing the offence will not alter the presumption till participation is shown. State vs. Farr., 33 Iowa 553.

The principle that evidence on the question of character by the defendant gives the State the reply is no doubt sound upon principle. It, however, has, in a later case (Reg vs. Dowse, 4 F. & F. 492) in England, been decided the other way. The true rule is, that proof of good character is admissible in all criminal prosecutions, not only where doubt exists on the other proof, but also to generate a doubt, Williams vs. State, 52 Ala. 411; it is to be considered by the jury upon the question of the credibility of direct evidence of his guilt, the same as upon proof of circumstances tending to show it, or the inferences to be drawn from such circumstances, Stover vs. People, 56 N. Y. 319; Remsen vs. People, 43 id. 6, and any declaration of law otherwise is error; so the failure to call witnesses as

J., said that "he concurred in that opinion, and that he had known instances in which the right had been claimed, but not insisted upon; in particular where it had been claimed against himself when at the bar, and the attempt was put down, not by any decision against the right, but on the ground that it was not usual; that he had never known the claim persisted in; and that he was bound to say that in strictness it existed, though he should certainly recommend that it should not be exercised." (The counsel for the prosecution then waived his right.

§ 136. The reasoning of the two judges in this case seem perfectly unanswerable. What is evidence to character produced for? To persuade the jury that the prisoner is not guilty, because from his previous good conduct he was not a person likely to have committed the offence imputed to him; and what is this but giving evidence to rebut the case sought to be established on the part of the prosecution, and therefore on every recognized principle entitling the prosecutor to reply? In addition, however, to *88 the case *of Rex vs. Stannard, a series of resolutions were entered into by the judges previous to the commencement of the Spring Circuit of 1837, in order to regulate the practice to be

to general good character raises no presumption of bad character, State vs. Dockstader, 42 Iowa 436. The competency of evidence does not depend upon the extent to which facts are proved thereby, Willoughby vs. Dewey, 54 Ill. 266, and to be relevant it need not be essential, and is not to be tested by its convincing character, but by its tendency, Comstock vs. Smith, 20 Mich. 338. If the testimony be relevant and competent, and it is actually before the jury, it is exclusively their province to make their own application of it to the case in hand, Allison vs. State, 42 Ind. 384; Salter vs. Myers, 5 B. Mon. 280; Mundine vs. Gold, 5 Port. (Ala.) 215. But it must be evidence in law, as where, as in Georgia, prisoners cannot testify in their own behalf, the introduction of the prisoner's statement does not give the State the reply, where the prisoner offers no evidence, Farrow vs. State, 48 Ga. 30. Evidence of good character is admissible in civil actions, where the nature of the action involves the general character of the defendant—or the nature of the defence that of the plaintiff—as where the defence in an action on a policy insuring goods from fire imputes to the plaintiff the removal of goods and setting the store on fire, Spears vs. International Ins. Co., 57 Tenn. 579.

adopted under the statute of 6 & 7 Will. IV., c. 114, which gives prisoners charged with felony a right to make their full defence by counsel; one of which is as follows: "If the only evidence called on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply," it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do." *Vide* those resolutions at length at the end of this volume.

§ 137. In order, however, to entitle the opener to a reply, the evidence put in by the opposite party, however trifling in itself, must be evidence to the issue really and actually given by him.(1) Thus previous to the rule made by the judges, H. 4 Will. IV., 17, which ordains that the payment of money into court must in all cases be pleaded, it was made a question whether the production by the defendant of a rule to pay money into court was sufficient to give the plaintiff a right to reply; in order to settle which doubt, the Court of Common Pleas declared (Feb. 8, 1810) that it was to be understood in future that it was to have no such

1. In Trials per Pais 367, it is said: "In evidence, he who affirms the matter in issue ought first to make the proof to the jury, Litt. R. 36; Godb. 23; 3 Leon. 162." In Coleman vs. Hagemau, 5 C. H. Rec. (N. Y.) 63, the judge said "that there was no doubt but that it was a general rule that the party holding the affirmative on the record, as in this case, had a right on the trial to open and conclude before the jury; but he thought it would be an utter perversion of justice to suffer the defendant to deprive the plaintiff of that which is considered an important advantage on the trial by interposing a plea, the allegation in which is expressly negatived by all the testimony. The spirit of the rule undoubtedly is that he who, *in truth*, holds the affirmative, shall open and conclude. But here the defendant, for the mere purpose of gaining that advantage, has put on the record a plea which is not supported by any evidence in the cause. His Honor ruled that the plaintiff's counsel might conclude before the jury."

When a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply, Arden vs. Tucker, 1 M. & Rob. 191, as where the defendant, on being called on by the plaintiff to produce a document, interposes with evidence to show that it is not in his possession, he is entitled to reply on the law to the court, but not a general reply on the case, as this is not a fact for the jury, Harvey vs. Mitchell, 2 M. & Rob. 366.

effect, as if the plaintiff took a verdict for the whole of his demand without giving credit for the sum paid into court, the court would set it aside without requiring evidence of the existence of such a rule, 2 Taunt. 267.

§ 138. Still, in the subsequent case of Crerar vs. Sodo, *infra* § 154, the defendant put in a rule for the payment of money into court and the plaintiff was allowed to reply. Again in the case of Dowling vs. Finigan,(*x*) which was an action for use and occupation, two witnesses were called for the defence to give evidence of conversation which each had with the plaintiff, and which *89 they *had both put down in writing. The first was asked by the defendant's counsel to produce his memorandum, but had not got it with him; this question was not put to the second witness; the plaintiff's counsel, in reply, observed on the absence of the papers, and when he concluded, Best, C. J., called up the second witness and asked for his; the witness handed it to the judge, who inspected and gave it to the plaintiff's counsel, telling him that he might read it or not as he thought proper, to which the other replied that he had no wish on the subject, but claimed a right to address the jury on this new piece of evidence; but Best, C. J., said: "Either party might have called for this paper; neither have done so, and it is for the satisfying the conscience of the judge that it is asked for now. I never knew of a counsel making a second speech on such an occasion, and I cannot allow it; I should be subverting the practice of the court."

§ 139. And in the case of Pullen vs. White,(*y*) which was an action of assumpsit, and a ledger and cash-book had been referred to, to refresh the memory of a witness for the plaintiff, who used only parts of them to support the case, the defendant's counsel, in his address to the jury, observed on the general state of the books and the mode in which the accounts were kept, and referred to other parts besides those used by the plaintiff's witness; and per Best, C. J.: "On this the plaintiff cannot reply, the known rule is against it."

§ 140. But if the defendant, prisoner, or party to be heard

(*x*) 1 C. & P. 587. (*y*) 3 C. & P. 431.

second, chooses to rest his case on the facts already put in evidence on the opposite side, or thinks he can, by his speech, induce the jury to believe that the witnesses who depose to them are unworthy of credit, and that neither tenders any fresh evidence to the issue, nor states in his speech any new facts bearing on the question, then the opener is, by the existing practice, clearly not *90 entitled to reply. The *reason assigned for not allowing him to do so is, that as the party who began has, in his opening speech, had an opportunity of commenting upon his own evidence, which he was about to produce, and as the opposite party has given none on his side, but merely commented upon that of the opener, the latter, who has already observed upon it, has no right to be heard twice, inasmuch as when the defendant does call witnesses, he is only heard the second time, owing to his ignorance, in the first instance, of the nature of the evidence which will be adduced on the other side. The correctness of this reasoning may, to a certain extent at least, be questioned, since the opener has only had the opportunity of commenting upon evidence which he supposed, or was led to believe from his instructions, would be given, but which often turns out very different from what was expected, while the respondent's counsel has the advantage of making a speech with all the evidence in the case before him, and the certainty that no more can be given. It is not, however, requisite to enter further into the discussion of this question; it is enough for our present purpose to know that the practice in question is quite clear, and fully established.(1)

1. The presiding judge is no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof. The modern rule is that there may be, in any case, a preliminary question for the judge, whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed, Eng. L. R. 2 Priv. C. App. 335; 14 Wall. 448; 22 id. 120; 11 How. 373; 10 Wall. 637; 9 id. 201; 4 Otto 278; 9 id. 676, 578. This question is usually invoked by a motion in the nature of a demurrer to the evidence, *ante* p. 85. It being purely a question of law, the party moving will be entitled to reply. If error be assigned, the rule is that the demurrant, or party moving, must

§ 141. An exception, however, exists in the case of State prosecutions, where it is admitted that the attorney-general, when prosecuting for the crown, or appearing in his official capacity, has always a right to reply, even though the defendant or prisoner calls no witnesses.(*z*) And this is allowed even on the trial of collateral issues,(*a*) and in revenue prosecutions in the exchequer. That this is a matter of prerogative appears very clearly from some comparatively recent cases. In Rex vs. Marsden and others,(*b*) which was an indictment for a libel in a newspaper, and the indictment charged that the defendants intending to traduce *91 and vilify the prime *minister of the day, and to cause it to be believed that he was guilty of disloyal intentions, &c., against the king and to bring him into hatred and contempt, &c., published the libel in question. No witnesses were called for the defence, and on the attorney-general's rising to reply, it was objected, by the prisoners' counsel, that this was a private prosecution instituted by the prime minister, and not a public proceeding on behalf of the crown. The attorney general then stated that he appeared in his official character; and per Lord Tenterdon: "There is no doubt of the rule; whenever the king's counsel appears officially he is entitled to reply." The very same day was tried the case of Rex vs. Bell,(*c*) which was a criminal information for a libel on the Lord Chancellor; the attorney-general conducted the prosecution, who stated that he appeared as the counsel and private friend of the prosecutor, and, no evidence having been offered for the defence, he did not reply.

§ 142. It is sometimes said that this is a peculiar privilege, confined to the attorney-general, or at most to him and the solici-

(*z*) Rex vs. Horne, 20 How. St. Tr. 662.
(*a*) Rex vs. Ratcliffe, 1 W. Bla. 3.
(*b*) M. & M. 439.
(*c*) M. & M. 439.

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prepare the paper-book and bring on the cause; and there is no danger of delay, since, by the rules of the court, the opposite party may also give notice of bringing on the cause, and may have judgment by default, in the same manner as if it was a case after a verdict, if the party demurring does not deliver the paper-books and move to bring on the cause pursuant to his notice, Littlefield vs. Storey, 3 Johns. 426.

tor-general; and in the case of Rex vs. Earl of Abingdon,(*d*) which was an information against the defendant for a libel on an attorney, and after the defendant had addressed the jury, the counsel for the crown claimed a reply; Lord Kenyon said: "Though the attorney-general had undoubtedly that privilege, yet he never knew any other counsel for the crown to claim it, and he would not make the precedent in the case before him." It is, however, mentioned by the reporter, in a note to that case, that in Rex vs. Smith, which was tried M. 37 G. III, where a party was indicted for libel, and called no witnesses, Lord Kenyon permitted the prosecuting counsel (not the attorney-general) to reply, although Rex vs. Abingdon was cited.(1)

1. Martin, B, in Reg. vs. Christie, 1 F. & F. 75, intimated that he thought the right of reply on behalf of the crown a bad practice, and that he should confine the right to the attorney-general of England in person. The right was practically denied in Reg. vs. Burton, 2 F. & F. 788; Reg. vs. Blackman, 3 C. & K. 330; 6 Cox C. C. 333; Farrow vs. State, 48 Ga. 30; Heffron vs. State, 8 Fla. 73; and where no evidence was offered by defendants in mint cases it was refused, Reg. vs. Taylor, 1 F. & F. 535; it is refused the attorney-General for the county palatine, though prosecuting in person, Reg. vs. Christie, 7 Cox, C. C. 506; and in a prosecution directed by the poor law board, counsel cannot claim the right to reply where the prisoner calls no witnesses, Reg. vs. Beckwith, 7 Cox, C. C. 505.

Rule IX., in Philadelphia Com. Pleas, is: "After the evidence in a cause on trial is closed (except in capital cases), neither party shall be entitled to address the jury by more than one counsel. If evidence has been received on behalf of each party, the counsel having the right on the pleading to begin shall sum up; one of the opposite counsel may then address the jury, and afterwards the counsel who commenced summing up may conclude. When the party not entitled to begin shall produce no testimony, the counsel of the other party shall be confined to his address in summing up, and shall not be heard in reply."

But the State will have the reply if there be any evidence for the defendant, as where there are several prisoners, and they sever in their defence, if one should call witnesses and the other not, the right of reply is in practice confined to the case against the prisoner who has called witnesses, Reg. vs. Burton, *supra*; so where two were indicted for night poaching, the defence being on a question of identity, one of them calling witnesses to prove an *alibi*, the other calling no witnesses, the counsel for the prosecution was allowed a general reply on the

(*d*) 1 Peake's Ca. 236.

§ 143. And the expression of Lord Tendenden, already quoted *92 in Rex vs. Marsden, that "wherever *the *king's counsel appeared officially*, he is entitled to reply," seems to show that it is a matter of prerogative, and not attached to the person of any individual. And lastly, it is one of the resolutions of the judges already alluded to that "In cases of public prosecutions for felony, instituted by the crown, the law officers of the crown, *or those who represent them*, are in strictness entitled to the reply, although no evidence is adduced on the part of the prisoner. *Vide* § 162.

In cases of impeachment before the House of Lords, the managers for the Commons enjoy the same privilege in this respect as the law officers of the crown, namely, to reply, even though the party impeached call no witnesses; which privilege they have occasionally exercised.(*e*)

§ 144. The third predicament, however, still remains to be considered, viz., when the defending party, although he calls no witnesses and gives no evidence, yet states in his speech to the jury some facts or circumstances, or reads some paper connected with the case not already in evidence, and which he declines to prove in the regular way. It is frequently said, and pretty generally believed, that such conduct gives the counsel who began a

(*e*) Per Lord Mansfield, Rex vs. Horne, 20 How. St. T. 662; Lord Wintown's case, 15 St. Tr. 864. It is now settled that the counsel for the crown, where the crown is the defendant, in a writ of error, is not necessarily entitled to the final reply, though the crown is the real litigant party, O'Connell vs. Reg, (in error,) 11 C. & F. 155; 9 Jur. 25.

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whole case as against both, Reg. vs. Briggs, 1 F. & F. 106; and where A. was charged with carnally knowing and abusing a girl under ten. B. was charged with being present and aiding and abetting. A's counsel called no witnesses; B. who had no counsel, called a witness to prove an *alibi* for A. *Held*, that the evidence was in effect evidence for A., and that, in strictness, the counsel for the prosecution had a right to reply on the whole case, but that it was *summum jus* and ought to be exercised with great forbearance, Reg. vs. Jordan, 9 C. & P. 118.

But it is held that a State's attorney in public prosecutions, is entitled to the close, although the prisoner offers no evidence in State vs. Millican, 15 La. Ann 577; Davis' case, 1 Gratt. (Va.) 557; U. S. vs. David Bates, 2 Cranch, C. C. 405, according to the practice in Reg. vs. Gardner, 1 C. & K. 628; Reg. vs. Tockley, 10 Cox C. C. 406; Reg. vs. Barrow, id. 407.

right to reply, although it is not usual to exercise it; but if this opinion be tried by the two legitimate tests of *principle* and *authority*, it will be found to be at least questionable, and as the question is one of considerable importance, we will give the arguments and authorities on both sides.

§ 145. In favor of the right it is contended, that a counsel, by stating fresh circumstances relative to the matter in issue, and still more by reading to the jury any important paper not already in evidence, enters substantially into a new case, which, as the *93 opener had no notice of, he could not *have anticipated in his first speech, and therefore, on the general principles above laid down, should be allowed to speak in reply to it. That it is quite clear that if the defendant's counsel, in the course of his speech raise a question *of law*, or cite a case of which no mention had been previously made, that the plaintiff's counsel is entitled to remark on that case and answer the objection of law, as he was not previously heard upon it; and therefore by analogy, that if, instead of fresh matter *of law*, the defendant's counsel introduces into his speech fresh matter *of fact*, the plaintiff should, on the same principle, be allowed his reply.

§ 146. That a counsel, by reading to the jury a paper which he afterwards refuses to put in evidence, is guilty of *mala fides*, and of an attempt to impose upon their understandings; and as jurymen are not learned in the law, and cannot see the distinction between what has been technically made evidence and what has not, they would naturally form their verdict as much from the facts thus *stated*, as from others which have been more regularly proved; and therefore, that it is but common fairness to the party who began, as well as a just punishment to the other for his misconduct, to allow a reply in order to prevent their being misled and justice defeated.(1)

1. In Naish vs. Brown et al., 2 Car & K. 219, Pollock, C. B., said: "The right to comment by way of reply on statements of fact made by counsel for the defendant, when no evidence is adduced, is not an absolute right, but only subject to the opinion of the court, I think you have not that right. The object of

§ 147. That not only is the general opinion of the profession in favor of the existence of this right, but it has been expressly recognized and allowed in the following cases. In Rex vs. Horne,(*f*) L. Mansfield said: "If he (*i. e.*, the defendant) were to throw out to the jury to catch and surprise them allegations of fact, which he called no witness to prove, then the counsel for the plaintiff may set the jury right, and lay them out of the cause, and show that they are absolutely irrelevant and immaterial." In Rex vs. Bignold,(*g*) which was an indictment for perjury, and *94 at the trial, after the case for the prosecution *was closed, the defendant's counsel addressed the jury, and in the course of his speech read some resolutions which had been passed, and stated some facts which he conceived material to explain the defendant's conduct, &c, but declined producing them in evidence or calling any witnesses: Abbott, C. J., permitted the prosecutor's counsel to reply on principle, and on the authority of a case which had been tried before Lord Kenyon, where a defendant's counsel read an advertisement from a paper, and afterwards declined putting it in evidence: and now in banc laid down (obiter) as a general rule, that when "counsel for the defendant opens facts on the merits of the case, and declines calling witnesses to those facts, *counsel for the prosecution has a right of general reply*, because the statement of facts and circumstances unsup

(*f*) 20 How. St. Tr. 662. (*g*) 4 D. & R. 70.

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the rule is *to check the statements of counsel*. In my experience, where a fact has been opened and a witness has turned out to be *bona fide* absent, there has been no reply allowed. In my opinion the rule is always subject to the control of the judge. The object of the rule is to take care that injustice shall not be done by facts being improperly opened when counsel have *no intention* of proving them." See Reg vs. Buther, 2 M. & Rob. 228.

Counsel have a right to correct misrepresentations of the evidence made by counsel in argument; and it is irregular for the court not to permit the correction to be made by recalling the witness, if in court, or referring to the testimony required to be taken down, in cases of felony, Long vs. State, 12 Ga. 203. The argument should be based upon controverted facts of the issue; so where a demurrer to a plea is sustained, defendant's counsel cannot comment on the facts contained in that plea as admitted, Ingram vs. Lawson, 2 M. & Rob. 253.

ported by evidence could not but have an effect on the minds of the jury." Bayley, Holroyd, and Best, JJ., were present, says the report, and did not *dissent* from this ruling. N. B.—Neither did they *assent*, the point not being before the court for its decision.

§ 148. And in Rex vs. Carlisle,(*h*) who was tried for a misdemeanor, and defended himself in person: at the close of the case against him, he was informed by the counsel for the prosecution, that if he (the defendant) called any witness, or read any paper not already in evidence, a reply would be claimed: and per Park, J.: "I had a similar case at Warwick, where a person defended himself; and I gave him warning, that if he called a witness, or read any letter or paper not already in evidence, or opened new facts which were not proved, the counsel on the other side would have a right to reply."

§ 149. In answer, however, to all this, it is to be remarked, that all the foregoing decisions were cases of criminal proceedings, and the general observations of the judges in some of them, *95 that this *right* always exists, must, therefore, *be considered as mere *dicta*; and, allowing those decisions their full weight, they only show that the rule holds in criminal cases, and not go the length of establishing its recognition at *nisi prius*, especially as we shall show, presently, that the *nisi prius* authorities are the other way. That in answer to the argument deduced by analogy from the plaintiff's counsel being permitted to reply on matter of law, it is to be remembered that that does not confer on him a right of *general* reply, but only the right to reply to the fresh matter of law thus adduced; so that allowing the analogy to its fullest extent, it only proves that a right of reply ought to be allowed upon the new facts thus introduced into the case, and not a general reply as here claimed.(1)

§ 150. But in truth no analogy exists; matter of law is addressed to the court, which, for the purpose of informing and guiding its own judgment, will hear both parties upon it, while matters of fact are to be decided by the jury, and it is about

(*h*) 6 C. & P. 636. (1) See *ante* p. 186.

them we are now considering. That in answer to the argument that a statement of facts unsupported by evidence must mislead a jury, we may remember that the jury is sworn to decide by the evidence *alone*: and that, instead of permitting a reply to facts improperly introduced in a counsel's speech, and thus following up one irregularity by another, it is the obvious duty of the judge to inform the jury that those facts are not legally before them in evidence, and that consequently it is their duty to disregard them altogether.

§ 151. And here, it is to be observed that the new facts thus stated by the respondent's counsel may belong to one of three classes:—1. They may be such that appear from their very statement to be incapable of proof by the party advancing them. 2. They may be such as are, for all that appears to the contrary, capable of proof by the responding counsel. 3. They may be not only obviously capable of proof, but the proof be in the counsel's *96 *possession; as when he reads a paper, letter, &c., to the jury. Now, with respect to the first of these three classes it has been held, that to state facts which are, upon the very face of them, incapable of proof, is irregular, and ought not to be allowed, and that it is the duty of the judge to stop any statement of the kind.

§ 152. Thus in the case of Stephens vs. Webb,(*i*) which was an action of assumpsit on an undertaking to pay money, to which the pleas were—first, non-assumpsit; and, secondly, that the undertaking was obtained by fraud and covin. It appeared that R. C. W., brother to the defendant, had been in custody on a ca. sa. to plaintiff for £35, on which occasion the defendant gave the undertaking to pay. A clerk to the plaintiff's attorney was called as a witness, who spoke as to a conversation between himself and the defendant, *no one else then being present;* defendant's counsel, in his speech, was proceeding to state an account that the defendant had given of that conversation, which differed from that already in evidence, and contended that he had a right to state the account which his client had given of the transaction: sed

(*i*) 7 C. & P. 60.

per Parke, B.: "You have no right to open as facts any matter which you cannot prove; it is often done, but it is irregular."

§ 153. But when the facts stated are such that it does not appear whether the counsel stating them has the means of proof in his possession or not, and he refuses to adduce any evidence to establish them, it is clearly the duty of the judge to instruct the jury to pay no attention to them; and should the jury, in contravention of their oaths, allow themselves to be influenced by such statement, the verdict would certainly be set aside as against evidence; it being a principle that the mere statement of counsel, unsupported by evidence, is to go for nothing. But where, in the third case we have supposed, a counsel shows, by his state-
*97 ment, *that he has the means of proof in his possession, as, for instance, in R. vs. Bignold, where he actually read a particular document to the jury, but afterwards refused to make it evidence in the regular way; here is *mala fides*, at least, and cases may occur where the ends of justice require that a reply should be made. Still, however, it is submitted that such reply cannot be claimed as a matter of *right*, although we are warranted, both on principle and authority, in concluding that a power is vested in the judge at *nisi prius* in his discretion to permit it.

§ 154. This view of the question is strongly supported by some decisions at *nisi prius*. In Crerar vs. Soda,(*k*) which was an action for work and labor as an accountant, to which defendant pleaded the general issue, and his counsel opened facts which he called no witness to prove, and then contended that the plaintiff's counsel had no right to reply, unless he admitted the facts stated as proved, sed per Lord Tenderden: "If the defendant's counsel refuse to call witnesses to establish the facts they have undertaken to establish, the judge may, *in his discretion*, permit a reply; *but as to the strict right, the practice is clearly against it.*" And it is particularly to be observed that this was the same judge who presided in R. vs. Bignold, (*supra* § 147,) while Crerar vs. Sodo is three years later. And again, in the more recent case of Faith vs. M'Intyre,(*l*) which

(*k*) M. & M. 85; 3 C. & P. 10. (*l*) 7 C. & P. 44.

was an action of assumpsit by the indorsee against the acceptor of a bill of exchange (for the pleadings, *vide supra* §. 77,) and the defendant began, the plaintiff's counsel cross-examined one of his adversary's witnesses, and proved by him the handwriting of a letter which plaintiff's counsel then read in his address to the jury, but did not otherwise put in evidence; and on the defendant's counsel claiming a reply, Parke, B., said: "I do not think *98 you ought *to reply. I never knew an instance of the opposite counsel actually replying after his opponent had opened facts which he did not prove."

§ 155. Defendant's counsel then argued that the cases admitted of this distinction, that sometimes a counsel or party wandered into a statement of facts, but without stating any specific piece of evidence, and that then, in point of actual practice, the opposite counsel did not in fact reply; but that in this case a document had been read, and the jury been put as much in possession of its contents as if it had been read in evidence, while the defendant's counsel had not objected, as it was fully expected from the handwriting having been proved that the other party intended to give it in evidence. Sed per Parke, B.: "I have often heard it threatened, that if a counself or party opened new facts, the opposite side would have a right to reply: but I never knew such a reply actually made. Perhaps as the counsel has proved the document, and read it to the jury, he ought in good faith to put it in; but I certainly never knew an instance of a reply on a mere opening."

§ 156. It will be remarked that this last case goes a step beyond the point in question, as the plaintiff's counsel not only read the paper to the jury, but actually proved its genuineness by one of the witnesses called on the other side. It seems, therefore, questionable, whether Faith vs. M'Intyre can be supported to its full extent; and the principle laid down by Lord Tenderden, in Crerar vs. Sodo, seems to be the true rule in this respect, so far as *nisi prius* is concerned. although we may collect from the two cases last cited that the permission to reply when only facts are

stated is not likely to be granted, except in the case of some specific paper being read to the jury, and afterwards declined to be put in evidence. With respect to criminal cases, although the *99 authorities, as shown above, *seem pretty uniform in favor of granting the reply, yet as the question does not seem to have been directly raised in any of them, whether that reply could be assumed as a matter of right, or was grantable at the discretion of the judge; and as it is not easy to see any distinction in principle between civil and criminal proceedings in this respect,(1) it may be very well questioned whether the allowing a reply on the mere statement of facts by the opposite party is not, in all cases, discretionary with the judge.

§ 157. It has been shown in the preceding chapter, that when the plaintiff has notice, by pleading or otherwise, of the defence intended to be set up, he may either go into the whole case in the first instance, and not only establish his own, but give evidence to rebut the intended defence;(*m*) or he may content himself with establishing a *prima facie* case, and reserve his evidence in reply till that of the defendant has been closed. If he choose the latter course, and the defendant, besides bringing evidence to impeach the plaintiff's case, sets up an entire new case, which again the plaintiff controverts by *evidence*, the defendant's counsel is intitled to a *special* reply; which, as he has already had an opportunity of commenting on the *prima facie* case of the plaintiff, must be confined to the new one set up by him; and then the plaintiff is entitled to the general reply.(*n*) Thus in Meagoe vs. Simmons,(*o*) which was an action of assumpsit by the indorsee against the acceptor of a bill of exchange, to which the defendant pleaded usury, plaintiff opened and proved the bill; defendant then opened his case of usury, and called his witnesses to establish it; witnesses were then called by plaintiff in reply to disprove the usury; and then a witness by the defendant to contradict what one of the plaintiff's had said. Defendant then *100 replied on the evidence *given in reply, and on the contra-

(*m*) See pp. 81, 82, 83, 134, 135, *ante*. (*n*) 1 Stark. Ev. 381; Roscoe on Ev. 106; *ante* p. 186.
(*o*) 3 C. & P. 75.

1. See *infra* p. 208.

diction given to a part of that evidence, and the plaintiff made a general reply.

§ 158. In the case of Goodtitle vs. Braham,(*o*) which was an action of ejectment tried at bar, the lessor of the plaintiff claimed as heir at-law; the defendant as devisee of the person last seized; a question arose as to who was entitled to the general reply; and per Curiam: "If the plaintiff proved his pedigree and stopped, and defendant set up a new case, which the plaintiff answered by evidence, which ultimately went to the jury, the defendant shall have the general reply; and Buller, J., said "that he had so ruled it in the cause of Doe vs. Hicks, summer assizes, 1789." This, however, is a decision which it seemed impossible to defend on any principle; indeed, it is said by some that the case is misreported; the right to reply in ejectment is governed by the same rules as in any other action. *Vide* the cases given *supra*, § 100.

§ 159. And the case of Goodtitle vs. Braham was at last overruled by Doe d. Pile vs. Wilson.(*p*) There the plaintiff claimed as heir-at-law of C. L., and defendant as her devisee, she, although a *feme covert*, having power under her marriage settlement to make a will. The plaintiff's title not being admitted, some evidence was given of his heirship, and of payment of rent to C. L., on which defendant admitted that a *prima facie* case had been made out, and, having proved the will, called for the settlement, which was produced. On this the plaintiff called a witness to prove that the testatrix was not sound of mind at the time of making the will. On this, defendant claimed a general reply, and cited Goodtitle d. Revett vs. Braham, which, however, was disallowed by Denman, C. J., who said "that in order to entitle a defendant to the general reply, he should admit the entire *prima facie* case of the plaintiff, which he had not done in the present instance.

§ 160. At quarter sessions the same practice prevails: if the respondent begins and the appellant afterwards calls witnesses, to disprove whose testimony the respondent calls others, the appel-

(*o*) 4 T. R. 497. (*p*) 6 C. & P. 301; 1 M. & R. 323.

lant has a right again to address the court, confining his observations to the testimony of the fresh witnesses, and then the respondent has a right of general reply.(*q*) If the appellant begins, the same practice is observed, *mutatis mutandis*.

§ 161. We have likewise seen (chap. 2 p. 126-7 *ante*,) that where there are several issues, the onus of proving some of which lies on the plaintiff and others on the defendant, the plaintiff is always entitled to begin; and the practice is for him to do so, and prove such of the issues as are incumbent on him; the defendant then does the same on his side; afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; the defendant is then entitled to a *special* reply on the fresh evidence in support of his own affirmative, and then the plaintiff has a general reply.(*r*)

§ 162. If, as has been already alluded to (§ 145, *ante*), the responding counsel, in his address to the jury, raise any point of law or cite any case, the other side will be allowed to reply to the point of law, or observe on the case cited, without touching on the facts in question (1) Thus in Arden vs. Tucker,(*s*) which was an action of assumpsit, and the plaintiff having begun, the defendant opened for a nonsuit, submitted that the action could not be supported, and, having cited some cases, called witnesses to establish the facts; this having been answered by the plaintiff's counsel, the defendant claimed the right to reply; and per Lord Tenderden: "The defendant having raised the objection, which *101 was one of law, and the plaintiff *having answered that

(*q*) Arch. Q. S 25. (*r*) 1 Stark. Ev. 382; Ros. Civ Ev. 163. (*s*) 1 M. & R. 191.

1. Upon a question of law addressed to the court, it is discretionary whether they will hear an argument, Howell vs. Com., 5 Gratt. 664. See *ante* p. 117. The objection of a witness to a question which he considers himself not bound to answer, is not a point on which counsel are heard, Rex vs. Adey, 1 M. & R. 94, and the witness may claim or waive his privilege as he sees fit, Thomas vs. Newton, M. & M. 48, and he may claim this at any part of the inquiry. and that he does not waive it altogether by omitting to claim it as soon as he might have done so, R. vs. Garbett, 1 Den. C. C. 258, overruling East vs. Chapman, M. & M. 47; and S. C. 2 C. & P. 573, and the time for the witness to make the objection is after he is sworn, Boyle vs. Wiseman, 10 Exch. 647.

objection, the defendant's counsel is entitled to be heard on matter of law only in reply."

§ 163. And in Power vs. Barham,(*a*) which was assumpsit on a warranty of four pictures, to which the defendant pleaded non-assumpsit, and in his address to the jury his counsel cited a case, on which the plaintiff claimed a right to observe on the case so cited; per Colerige, J.: "He was entitled to do so if he thought proper.(1)

§ 164. If, also, as frequently happens in the course of a trial, an objection of law or a question as the admissibility of evidence be raised, it is said that in strict practice all the counsel on the side of the party making the objection are entitled to be heard upon it; then all those on the other side against it, while the leading counsel only of the party who started the objection is to be heard in reply. However this may be it is certain that if a counsel makes an objection of this description, which his adversary answers, he is entitled to reply. And in the case of Fairlie vs. Denton,(*b*) where in the course of the case the defendant's counsel took an objection, which was answered by the counsel on the other side, but in replying on the objection the defendant's counsel cited a case, Lord Tenderdon said: "As a case has been cited in replying on the objection, I think the plaintiff's counsel has a right to observe on that case."(2)

1. The party who merely refers to cases in his opening argument, without reading, is understood to acquiesce in such authorities not being read, and unless they are read by the opposite side he is not strictly entitled to take them up again. Cutter vs. Thomas, 24 Vt. 647.

2. If defendant's counsel goes for a nonsuit on a point of law, and the plaintiff's counsel answers it, the defendant's counsel has a right to reply on the law only. Arden vs. Tucker, 1 M. & Rob.; Shotwell vs. Malt, 38 Barb. 445, 192.

The party making a motion is to go forward with the argument, Tarbel vs. White River Bank, 24 Vt. 655; but if the motion is in the nature of a rule, *nisi*, with a *prima facie* case made against the party showing cause, he is entitled to close, Boyce vs. Burchard, 21 Ga. 74.

The burden is on the plaintiff in error to allege, by proper averments, and prove errors on which he relies, Shedman vs. Holman, 33 Miss. 550; Courtwright vs. Slaggers, 15 Ohio St. 511; O'Keely vs. Territory, 1 Oreg. 51; Parsons vs. Burney, 15 Tex. 272.

(*a*) 7 C. & P. 358. (*b*) 3 id. 103.

THE FOLLOWING CASE (Reg vs. Webb, 4 F. & F. 684) IS INSERTED FOR THE USEFUL LESSON IT SUGGESTS:

The prisoner was charged with burglary at Chaddingstone, on the 11th of August.

Barrow for the prosecution; C. C. Addison for the prisoner.

At the close of the case on the part of the prosecution, and Addison having intimated that it was not his intention to call witnesses, Barrow proceeded to sum up the evidence in accordance with the provisions of a recent Act of parliament.

Addison having addressed the jury on behalf of the prisoner, Millor, J., at the commencement of his charge to the jury, called their attention to the fact that this was the first case during this Assize in which the counsel for the prosecution had availed himself of the privilege conferred by a recent Act of parliament, of summing up the evidence when no witnesses were called on the part of the defence. His Lordship observed that he quite agreed with the opinion which he recollected to have been entertained by his late brother Crompton, a judge of great learning and wisdom, that the Act of parliament which conferred the privilege would turn out to be beneficial, or otherwise, according to the manner in which counsel availed themselves of its provisions. His own opinion certainly was, that if the effect of the act was to assimulate in all respects the criminal and civil modes of procedure, nothing could be more lamentable; in cases usually tried at *nisi prius*, counsel were in the habit, to a certain extent, of identifying themselves with the interests of their clients, and it was their duty to struggle hard in their exertions to obtain a verdict; but in criminal cases this ought not to be the feeling of the bar.

The Act which had been passed was intended to operate as an aid to the administration of justice; but if improper use was made of it he feared it would turn out otherwise.

Again, in Reg. vs. Bervens, et als., 4 F. & F. 849, Blackburn, J., before summing up the case before the jury, took occasion, first, to comment upon the effect of the Act—Denman's—enabling the prosecuting counsel, in criminal cases, to sum up the case after the evidence for the prosecution had been adduced. It seemed to him, he said, from some observations which had been made, that the object of that act had been misunderstood, and that if counsel proceeded to act on it in the way for which some appeared to contend—though no harm had resulted from the exercise of the privilege in this case—it would either be necessary to repeal the act, or the course of criminal justice might be seriously injured. It had always hitherto been the supposition in the administration of criminal justice, as a gene-

ral rule, that the prosecuting counsel was in a kind of judicial position; that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility—not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more.

At *nisi prius* the counsel was at liberty to try to get his client a verdict, if possible, by fair and proper means. In a court of criminal judicature, the counsel for the prosecution was in a different position. The Act of last session did not make it a duty, as he thought, of the prosecuting counsel in criminal cases to sum up, but gave him the power to sum up where that had become *exceptionally* necessary, in order to set right something that had come out in the course of the case, and might seem to him to require explanation. If that course were followed—if, in other words, the prosecuting counsel, when the evidence had been adduced, were to say nothing, unless something *different from what he had opened had been elicited*, and it was necessary, therefore, that he should give some explanation, then it might be deemed the counsel for the prosecution would have rightly appreciated the meaning and intention of the act, and the course of criminal justice would go on as it ought to do—the prosecuting counsel regarding himself really as part of the court, and acting in a *quasi* judicial capacity. But if the practice was, as he understood it had become in this court, to regard the summing up by the prosecuting counsel as a duty, the course that obtained at *nisi prius*, which was a contest between party and party, might creep in, and the prosecuting counsel in a criminal case, forgetting that he himself was a kind of minister of justice, might, at the end of his case, address an urgent appeal to the jury, and make himself a mere partisan. In that case it would be a positive duty and necessity for the judge, instead of regarding the counsel for the prosecution as *assisting* him, to watch and see that there was no unfair advantage taken by him to catch a verdict, apart from the merits. He quite agreed that it was in the discretion of a prosecuting counsel whether he would sum up or not; but he thought that it should be exercised *only in exceptional cases, and not as a rule*.

The Reporters, in a note to the above case, say: "The Act in question (28 Vict. 218) recites that it is expedient that the law of evidence and practice on trials for felony and misdemeanor should be more nearly assimilated to that in trials at *nisi prius*, and enacts (§ 2) that it shall be the duty of the judge, at the close of the case for the prosecutor, to ask the counsel for the prisoner whether he intends to adduce evidence; and in the event of his not announcing his intention to do so, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against the prisoner; and every prisoner shall be at liberty to open his case and examine witnesses, and, when all the evidence is concluded, to sum up the evi-

dence respectively, and the right of reply and practice and course of proceeding shall, save as hereby altered, be as at present. Upon which it is to be observed that the language is in substance the same as in the C. L. P. Act, 1854, § 18, as to trials at *nisi prius;* that the party who begins shall, in the event of his opponent not calling evidence, be allowed to address the jury a second time at the close of the case, for the purpose of summing up the evidence, and the party on the other side shall be allowed to open the case, and also to sum up the evidence."

As to which it has been held that this means legal evidence, and evidence legally sufficient to call for an answer, Hodges vs. Anerum, 11 Exch. 214. So that if the judge rules that there is no case, the counsel cannot address the jury, but only the judge.

This seems to open the key to the *true construction* of the clauses, which is, that the second speech of the counsel for the prosecution or plaintiff is to be confined to comments on *the evidence* given; though the second speech of the counsel for the prisoner or defendant may comment upon *all* the evidence which has been given, and can scarcely avoid doing so; and the words are that he may sum up *the* evidence, not *his* evidence.

It is clear that within these limits these enactments give an absolute right; but on the other hand, the exercise of it is subject to that general judicial control which the whole conduct of counsel in the course of a case, especially a *criminal* case, clearly is, and more particularly the counsel for the prosecution. It is to be observed that under both these enactments, if the defendant calls no witnesses, he has the last word, as at common law; and, on the other hand, if he calls witnesses, the prosecution has the last word, as at common law, so that the duty still—as before—devolves upon the judge, of exposing any sophistries or fallacies in the view of the case presented in the last address.

It is clear, from the whole scope and tenor of the act, especially the proviso as to the general course and practice in the proceedings, that the act was not intended to be a step towards a general assimilation of civil and criminal procedure, or to do away with those numerous distinctions which exist between them, especially as to the course and conduct of the case for the prosecution.

And as before the act, it was well settled that the right to *reply* ought not to be exercised except where really necessary for the purposes of *justice;* so of the right to sum up under the present act. And it is gratifying to observe that there was no difference between the learned judge and learned sergeant as to the existence of the above mentioned distinction or the general principles to be adhered to.

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CORRECTIONS.

(*To be made with a pen.*)

N. B.—Make the corrections in the line counting from the bottom.

Page 38 in the 6th for "axionialic" read *axiomatic.*
" 41 " " 2d " "disreputed" " *disputed.*
" 54 " "18th " "necessary" " *unnecessary.*
" 58 " "10th " "predicted" " *predicated.*
" 58 " "28th " "prescription" " *presumption.*
" 73 " "12th " "places" " *persons.*
" 82 " " 9th " "contradiction" read *contradictionin.*
" 87 " "19th " "effectual" " *ineffectual.*
" 119 " " 6th " "election" " *action.*
" 139 " " 6th after "such" add *pleas in abatement.*